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ENDANGERED SPECIES AND WETLANDS—PART I

1023-A
OVERSIGHT HEARINGS

BEFORE THE

**TASK FORCE ON ENDANGERED SPECIES
AND TASK FORCE ON WETLANDS**

OF THE

**COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES**

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

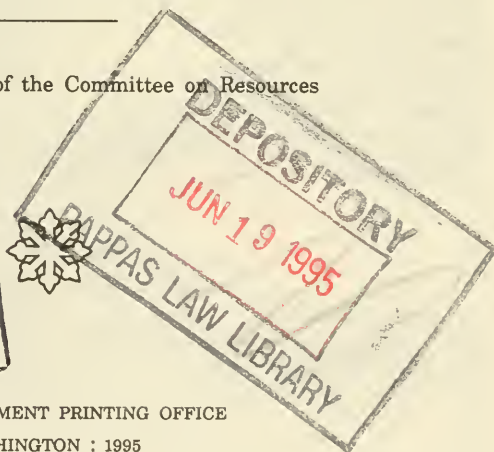
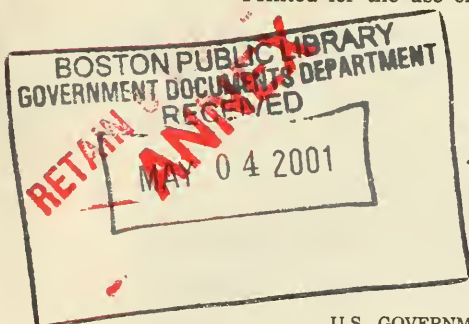
ON

**THE IMPACTS OF ENDANGERED SPECIES ACT AND
WETLANDS ON THE STATES OF LOUISIANA AND
TEXAS**

MARCH 13, 1995—BELLE CHASSE, LA (ESA & WETLANDS)
MARCH 20, 1995—BOERNE, TX (ESA ONLY)

Serial No. 104-6

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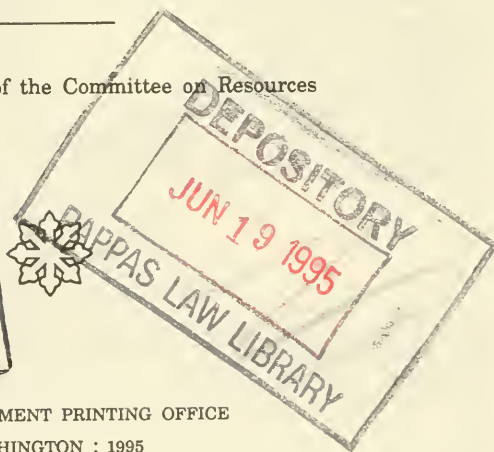
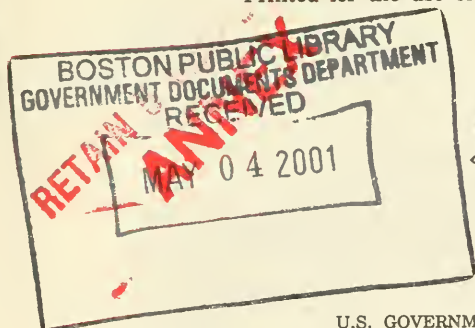
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ENDANGERED SPECIES ACT AND WETLANDS

MONDAY, MARCH 13, 1995

HOUSE OF REPRESENTATIVES, JOINT TASK FORCES ON
ENDANGERED SPECIES AND WETLANDS, COMMITTEE ON
RESOURCES,

Belle Chasse, LA.

The task forces met, pursuant to call, at 9:03 a.m., in the Belle Chasse Auditorium, Belle Chasse, Louisiana, Hon. Richard W. Pombo (Chairman of Endangered Species Task Force) and Hon. John Doolittle (Chairman of Wetlands Task Force) presiding.

STATEMENT OF HON. RICHARD POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. POMBO. The hearing will come to order.

In the interest of time, the opening statements of the members of the Task Force will be included in the record.

I would like to thank all of you for attending this hearing this morning. I would like to thank the Members for their attendance as well as all of the members of the panel, for agreeing to testify before the Task Force and sharing your thoughts and views with the Members of Congress who belong to the Endangered Species Act Task Force.

I am Richard Pombo, I am a cattle rancher from California. I am in my second term in the House of Representatives. My family has been on the same ranch for four generations and although my district is different than southern Louisiana in many respects, I represent most of the California delta. I also represent one of the richest agricultural areas in the world.

We have, in California, many of the problems and many of the solutions that have been proposed over the past several years for the Endangered Species Act. I know the way that the Act has been implemented in the past several years has caused a lot of problems. I realize that you, like my constituents, feel that the Federal Government has just not listened. And one of the reasons why we wanted to do the field hearings across the country was because we did want to come out and listen to the problems and the solutions across the country for fixing the Endangered Species Act.

I look forward to the testimony this morning, I look forward to all of your comments and again, I thank all of you for coming.

[The statement of Mr. Pombo follows:]

STATEMENT OF HON. RICHARD W. POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Good morning ladies and gentlemen. It is a special privilege to be in Belle Chasse this morning to begin the first in a series of field hearings on the direction of our national policy on endangered species.

I would like to welcome all Members, witnesses and guests to this morning's hearing. I am glad that our Resources Chairman, Don Young, has asked that these hearings take place outside Washington, for it is here—and not in our nation's capital—that the outcome of this Congress' efforts to reform the Endangered Species Act will have lasting consequences on both species and people.

I am a fourth generation rancher from the Central Valley in California. Although my area is quite different from this part of the country, I have to believe that my constituents suffer from similar problems with regards to wetlands and the Endangered Species Act that folks are suffering from right here in Belle Chase.

My constituents are frustrated and angry about a law that allows government bureaucrats to put the protection of a rat, or a shrimp—or any other species—above the lives and safety of human beings. They are frustrated because they believe that the balance of wildlife protection has swung too far away from the reality of meeting the needs of the people of this country for food, clothing, housing, fuel and other vital public goods and services.

They are also angry that they are being forced to give up their private property rights without any regards to the Fifth Amendment right to just compensation. I firmly believe that when the government places restrictions on a landowner, as it often does in the name of the Endangered Species Act, it has the responsibility to ensure that such laws are equitable and that the public benefits derived from them are paid for by the entire public, not by a select few whose only offense is that they own private property.

Finally, my constituents are hurt. They are hurt because as farmers and ranchers, their entire lives have been shaped by the traditions and values associated with the proper stewardship of the land, and yet they are considered to be the bad guys by government bureaucrats who think that only they know how to best protect endangered species.

The people of my district sent me to Congress to bring some sanity and reason back to the way in which we manage our natural resources. They sent me there to search for a new equilibrium between conserving the land and meeting the needs and rights of people.

As we conduct these hearings around the country, we want to look at the true impacts and costs involved in natural resource protection. The American people are both creative and imaginative, and if given the opportunity can use their knowledge and ability to find ways to conserve our biological resources without the heavy hand of a central bureaucracy. The current Endangered Species Act has had the unintended effect of creating disincentives for habitat protection.

The job of this task force is to bring together the information that will lead us to good public policy. We hope that the witnesses we will hear from today and over the course of the next several weeks will help us to make the best policy possible for achieving both conservation of our resources and compassion for our people.

Mr. POMBO. I would like to recognize Congressman John Doolittle, who is the Chairman of the Wetlands Task Force for his opening comments.

STATEMENT OF HON. JOHN DOOLITTLE, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. DOOLITTLE. I am also from California and serving in my third term, and Richard Pombo and I have adjoining districts. I do not know if it is coincidence or what, both of our areas are deeply involved in the controversy surrounding the Endangered Species Act and wetlands policy. When I see your wetlands, to me these are real wetlands, no question about it. Our wetlands, one would not suppose would be classified as wetlands in most cases.

We are here to hear from your direct experiences with the Federal regulatory acts that affect your activities. We want to know what these experiences have been. We are gathering this information with a view to reforming some of these areas of the law. Truly, we look forward to hearing from each of you, hearing your perspectives, the individual circumstances that affect your situation, and our goal is to try and improve the way the law works for all of us as a country, and to enhance the values that we all revere, includ-

ing of course, the value of the right to own and use private property.

With that, I will turn the time back to Mr. Pombo, who I think is going to be chairing the first panel here.

[The statement of Mr. Doolittle follows:]

STATEMENT OF HON. JOHN DOOLITTLE, A U. S. REPRESENTATIVE FROM CALIFORNIA

I am happy to be in Louisiana where wetlands are truly a part of the landscape. I know that the people of Louisiana have a true appreciation for the value of wetlands and the role that they play in protecting people, in seafood propagation, and environmental protection. It is gratifying to see the efforts being made by the State of Louisiana and its citizens in restoring degraded and declining wetlands.

However, as we ride through Louisiana and visit communities such as Lafitte and Belle Chasse, we realize that the people of Louisiana have lived in harmony with wetlands. They must live in, work in, and use wetlands as a resource and as a home. The history and culture of this area is intermingled with the use of wetlands.

The mission of our wetlands task force is to hear how the Federal policies currently in effect are working to protect wetlands and how those efforts impact the people who live and work in wetland areas. We are very concerned about whether current wetland policies are being carried out consistent with the basic civil rights provided in our constitution. We are also concerned about the impact of Federal wetlands policies on communities and their tax bases. Local property taxes provide for basic services such as schools, police, fire protection, roads, and parks. In addition, the economy of an area with significant wetlands acreage can also be severely impacted by the wetlands policy of the Federal Government.

We all understand the value of wetlands in environmental protection. We know that wetlands are essential as habitat for a broad array of wildlife and plants. Without wetlands our fisheries production would be lessened. Wetlands also play a role in Louisiana in protecting communities from hurricane damage.

Today, we have invited witnesses to testify who have had personal experiences in dealing with our wetlands regulatory program. I hope today, our witnesses will provide us with insight into how Federal wetlands policies are either working or not working to provide the right balance between the needs of our people and the need to conserve our wetlands.

Mr. POMBO. We have Congressman Bruce Vento, who is the ranking Democrat here with us today.

STATEMENT OF HON. BRUCE VENTO, A U.S. REPRESENTATIVE FROM MINNESOTA

Mr. VENTO. Thank you, Richard, and thank you for holding the hearing and for coming down here. There is a significant amount of work going on in Washington. Trying to get input at this time when we are as busy as we are is a special challenge.

I am a strong supporter and a strong environmentalist and have worked in Congress for some years, with a background as a science educator, and I am from Minnesota. The problems and issues that we face, even the Endangered Species Act by itself, would be enough for any one task force to have a hearing on today—coupled with wetlands laws and policies provides an even greater breadth of topic today.

However, considering both of these measures, and how they affect this area, they do come together. And I think they underline the complexity of trying to write public policy and administer it in various states in this nation—the differences between Louisiana and Minnesota. I said to Billy Tauzin the only similarity is that part of Minnesota was part of the Louisiana Purchase—we think the better part, but I am sure they may disagree here with that.

[Laughter.]

Mr. VENTO. But the issues, of course, pose difficulties and challenges. And I think that while we support the laws, the concept of "no net loss" of wetlands or support the preservation of endangered species, obviously we have to work to try to better facilitate that and better understand what the issues are on the ground. I think a lot of it gets to be very emotional and we need to separate the issues in terms of facts as we come down.

We have a lot of work to do in that regard. I hope we can be deliberate in the process and move forward. I think that as we look across the country, everyone supports the goals and generally supports the laws. Obviously, the effect of what they are doing at the local level is very important. They are complex issues. Wetlands and watersheds are associated, in fact, with endangered species. That is one of the reasons there has been review to look at concepts like ecosystem management, recognizing that you cannot separate in many instances an individual species from the ecosystem in which it survives. And that means a greater cooperation between the Federal Government and its goal, the states and the local governments and the people that are impacted by such policies. With regard to the growing base of information and knowledge and how these complex systems work, one scientist said it is more complicated than we think. That obviously is an understatement. Most of us in Congress pass and act on general policies, general laws, and depend upon the scientists and administrators to deal often with specifics. If we find problems, we can reach in to solve them, but I think that there is broad support in this country is for these laws. They are not a product of a political party or a system, they are a reflection of what people basically support.

And I would urge my colleagues to embrace that and try to make these laws work and attain the goals that the American people support.

Thank you, Mr. Chairman.

Mr. POMBO. Thank you.

Next, we have Mr. Billy Tauzin, and Billy, I imagine you have an opening statement. Shall I get the lights?

STATEMENT OF HON. BILLY TAUZIN, A U.S. REPRESENTATIVE FROM LOUISIANA

Mr. TAUZIN. I will be very brief, Richard.

Let me just say a word of welcome. The last time we had this many Members—in fact, this many Republicans—in New Orleans was the Republican Convention in 1988. We are delighted so many of you came. I hope the audience appreciates that. We have had Congressional hearings in this area where one, maybe two other Members from around the country came to hear about our problems. Look at the group assembled here today.

This is a new day and a new time when Congress is reaching out to hear the voices of America. That is what these task forces have been appointed to do. This is the first national meeting held in our district, and I am very proud of both Mr. Pombo and Mr. Doolittle for selecting our area for their first national meeting of the task force. It is a joint task force meeting, both endangered species and wetlands together. And the new majority in Washington is working, not only through the ordinary committee system, but through

this task force arrangement, for this very purpose, to make sure that we do not just listen to lobbyists in Washington, that we do not just listen to each other like we often do; that we actually come out into the communities and hear the voices of Americans speaking about these two very critical issues and many other issues where task forces are going to be traveling around the country.

I want to welcome all my colleagues. Yesterday, most of them had a chance to go to Lafitte and to see the shrimping community, what is left of it, in Lafitte—now 25 fishing family boats when there were once 200 in Lafitte. To see the problems they are experiencing with the Endangered Species Act, trying to earn a living and at the same time trying to be respectful of nature and trying to protect turtles. Yesterday, they had a chance to see some of the wetlands problems around the New Orleans area, the great problems we are having protecting ourselves from hurricanes, deciding where levees go, deciding where we can develop and where we cannot, the difficult problems we have in dealing with the issue of private property when it comes to government regulations to protect wetlands. And so they had a first-hand look, in person, at some of the problems we experience in this part of the country.

I can tell you the one common mention I heard from everybody, including my good friend, Mr. Vento from Minnesota, with whom I differ every now and then—I told him he might have been part of the Louisiana Purchase, but every now and then I think about selling him back to France, you know.

[Laughter.]

Mr. TAUZIN. But I am sure he feels that way about me once in awhile.

But there is a common feeling among this panel, after we have been through this part of the country and seen it. Everybody said, "You know, your problems are different than ours." And that is the first theme of these task forces—the problems are different all over America. And once we learn what the different problems are, then maybe we can come to some common solutions that work for everybody, instead of just one area of the country, one kind of problem around the country.

I do not want to say anything more because I want to hear a lot today. Thanks for coming, all of you for being here, and I want to thank my colleagues for coming in such great numbers to listen to the voices of the Third Congressional District in Louisiana and the folks who have to live with the policies and the regulations we make in Washington, D.C. Thanks again and welcome to the hearing.

Mr. POMBO. Thank you.

[Applause.]

Mr. POMBO. I ask unanimous consent that everyone's opening statements be included in the record and I would like to move to the first panel.

We have with us today Mr. Rickey Matherne—and if I mess up you guys' names, I apologize.

Mr. TAUZIN. Matherne [pronouncing].

Mr. POMBO. Matherne—I will let you do the names.

Mr. Matherne has been a shrimper for over 18 years in Louisiana, he is a captain and owner of a shrimp boat and has been an

active member of the Concerned Shrimpers of Louisiana and Louisiana Shrimp Association. Mr. Rene Simon is a sugar cane farmer from New Iberia. His family has been sugar farmers, he currently leases over 1000 acres near Weeks Island for his farm, and has concerns over critical habitat on the Endangered Species Act. Mr. Tom Bourland is the Chairman of the Louisiana Black Bear Conservation Committee. The committee is a voluntary organization with the goal of restoring the black bear population to a healthy level. Mr. Bourland is also a wildlife biologist and forestry consultant. Mr. Sam Pullig is a partner in Red Oak Timber company. They have red cockaded woodpeckers on their property and have been working with the Fish and Wildlife Service to be able to harvest their timber.

I would like to start with Mr. Matherne.

Before you start, I just want to point out—and you can redo the light—the lights are to control the time. What we would like to do is limit your opening statement to five minutes. You can just summarize what your opening statement is, and then that way, it leaves time for us to do questions. Your complete opening statement will be included in the record, but if you could summarize it and keep it within the five minutes, that would give us more time to ask questions about specifically what is going on. So I would appreciate it if you would try to stick to the lights. Thank you. And you can start.

STATEMENT OF RICKEY MATHERNE, SHRIMPER, BARATARIA, LOUISIANA

Mr. MATHERNE. I would like to thank the Endangered Species Task Force and the Wetlands Task Force for this opportunity to express some concerns about TEDS and the Endangered Species Act that has been eating away at our industry like a cancer.

After five years of TEDS, we still have problems—old problems and new problems—with enforcement that has to be addressed.

I have tried every different TED there is available. I have bought over 50 TEDS and still today I am pulling trawls with TEDS that I am losing a percentage of my shrimp.

Today many boats, homes, cars have been repossessed, lives have been lost and families broken up as a result of TED regulations and the Endangered Species Act. It feels as if a train has run over this industry, as if regulations being the train and the Endangered Species Act being the locomotive that does not look back.

From the beginning of TEDS, the shrimp industry felt that we were not the ones causing all these turtle deaths than every other cause that was documented and we stand by that today. With more than 98 percent compliance, the turtles are still washing up on the beach, after five years of us pulling these TEDS.

Over the years, the relationship with NMFS and the shrimp industry has eroded to complete distrust and no respect. This stems mainly from the TED regulations, and there has also been a problem with NMFS at the upper levels.

I recall one personal experience I had myself, when TEDS was on a voluntary basis. A NMFS agent came down to my vessel and installed the TED itself. I went out there, kept a log of the performance of the TED, turned it over to NMFS when I came in.

NMFS took the log, put out a report that TEDS would be an asset to the industry and after reading the report they put out, I noticed a couple of my drags were missing. The drags that was positive to the performance of the TED was in the report. The drags that showed negative results to the TED was omitted. And I went up to Andy Kremer and I asked him, I said, "Andy, you all put out a false report." "Oh, no way," he said, "what are you talking about?" I said, "Well, how come you omitted some of the drags in my report?" And I was upset because I gave these people this information, I was honest, and for them to do this to me. He said, "Well, Rickey, we did not omit your drags," he said, "the process we use is selective data." We select the data that we use, we do not use all the data.

If there is ever going to be a reasonable relationship in the future, the agency must revamp their intentions toward the shrimp industry. Many feel there are individuals in the agency that are continuing to force a wedge between the agency and the industry, and this has to stop. I have no trust right now with NMFS. That is just one example, there are other examples that I could back that up with.

The TED issue, the approach that NMFS takes—you have got to remember, these people made the TED, these people enforce the TED. When you are in violation, these people judge you and fine you. They are the judge, the jury, the trial and everything.

Their approach to conserving the sea turtle is a blanket approach and it is inflexible and does not follow the recommendations of the National Academy of Science study. The industry thought we was going to get a fair study here. The study that came out, we have TEDs right now year-around all over everywhere. On page 147 of the National Academy of Science study, it makes a very strong case for relaxing TED regulations in areas where turtles historically have been rare, such as the deeper waters of the Gulf. The study also recognizes the fact that TEDs are not necessary everywhere all the time year-around. Because of enforcement reasons, we have TEDs all year-around and that is the only reason.

They also found where there is grass and debris, TEDs are not acceptable, tow times should be applied. After Hurricane Andrew, that Gulf was a disaster, we lost a lot of money because we had to pull TEDs.

I could tell you, after five years of TEDs, of us losing shrimp, lost time and TED cost, the shrimpers have paid their dues for turtles. Everyone wants to protect the species, but only at the cost of the shrimper. If the public feels that strong about this species, they should start helping the cost, start paying us back.

The final point I would like to make about the Endangered Species Act, the Act itself is the most powerful Act today on the books and there is no doubt when this Act was written, it was for good intentions, never crossed the minds of the authors that misuse would ever come this far. This Act has become so powerful and rigid that at times the misuse is up to the height of war. And as long as economics is not considered in this Act, every person that goes to work today is working without job security. A judge once told me, he said, "Rickey, you ever come in front of me in the court with a TED violation, I do not care if the TED was blocked up, it

was full of grass, it was not working, I do not care if you lost all your shrimp, the law states you was pulling a TED or you was not pulling a TED, there is no room for any other consideration."

You know, when the American people is going to sit down and let a family lose their home to a fire because they cannot put a firewall there to save the homes—cannot push the firewall because of the burrows for the rats, there is something seriously wrong here.

Nature is our ward and it is not our master. When man has to choose between his well-being and that of nature, nature will have to accommodate and man will have to do what he has to do. Now that is a strong statement, but people, when you are going to watch a family's home burn for the protection of a rat, we have got some problems here.

I will answer any questions you all would like.

Mr. POMBO. Thank you. Mr. Simon.

[The statement of Mr. Matherne may be found at end of hearing.]

STATEMENT OF RENE P. SIMON, SUGAR CANE FARMER, NEW IBERIA, LOUISIANA

Mr. SIMON. Mr. Chairman, Committee members, good morning and thank you for having me here today. My name is Rene Simon and I am President of the Alliance for Constitutional Defense. The Alliance represents landowners who own or control substantial acreage within the proposed critical habitat for the black bear in Louisiana. The Alliance's members range from large land-holding companies to the small family farmer. I am a sugar cane farmer in St. Mary Parish, and all of the land that I farm is within the black bear's proposed critical habitat.

The alliance members, all of whom are Louisiana citizens, are particularly concerned because critical habitat is not defined as an area necessary for the continued survival of the bear, but rather an area essential to the conservation of the bear. The term conservation is defined in the Code of Federal Regulations as "the use of all methods and procedures which are necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." History of the U.S. Fish and Wildlife Service's unbridled discretion to determine what is in the best interest of the species, evidences that traditional use of private property is consistently and severely affected in the proposed critical habitat area. Two famous or infamous examples of this unbridled discretion are the spotted owl in the northwest, in Oregon and Washington, and of course, as Mr. Matherne mentioned, the kangaroo rat in California.

Another item of concern is that there is no precise and accurate population figures on which to base the recovery of this black bear. The Fish and Wildlife Service admits that current black bear population estimates run from "crude" to "best intuitive guess". The information provided by the Service indicates that the black bear densities are high—and let me interject here, they seem to be the highest about two miles from my farm, that is one reason why I am so concerned, near Weeks Island, and I farm the land all around Weeks Island—with general population being in good health with better than average reproduction. Lack of baseline population data will now allow for credible evaluation of the recovery

efforts. In order to provide sound census and biological data to make a responsible decision, detailed and appropriate census and scientific studies must be completed prior to giving serious consideration to the designation of the habitat. For the Fish and Wildlife Service to do otherwise is at best premature and more likely a misuse of the Endangered Species Act.

The history of the Service's administration of the Endangered Species Act and the lands affected indicate an eventual termination of agricultural, commercial and developmental activities within the proposed habitat. So you can see why I am so concerned, because I own my farm, I have a whole lot of money invested in it and I do not need my agricultural activities terminated. The majority of residents to be affected by the loss of the black bear habitat lands are presently living at or near poverty level and cannot withstand unnecessary interference with their ability to make a living. All of my workers will be affected by the decision of the critical habitat and those guys need the money that I am giving them or they go on welfare. So you know, we are going to pay one way or the other for this.

The people of Louisiana live in harmony with the black bear and are good stewards of the land. The Federal authorities readily admit that landowners have exhibited an unusually high degree of responsibility with respect to the bear. Federal stewardship on private lands is historically fraught with catastrophic consequences for the landowner and farmer, and frequently the natural resources and wildlife are not benefited. Landowner resistance to the unnecessary Federal intervention is the only rational process available for protection of the landowner's constitutional rights.

The real question is not whether critical habitat for the bear in Louisiana should be designated because non-landowning environmentalists demand it, or because it is politically expedient, but whether the process should be put on hold until the necessary data are available to make a professionally credible evaluation. The present process suggests that the only item that is threatened is the credibility of the Endangered Species Act and the process behind it, not the Louisiana black bear.

The alliance is, and the citizens of Louisiana are strongly opposed to the designation of private lands in south Louisiana as critical habitat for the black bear. We believe that such designation is unnecessary to the survival and the population increase of black bears because such a designation would result in an unnecessary usurpation and limitation of private property rights, which are among the most sacred guaranteed to the U.S. citizen. We urge the committee to prevent the designation of lands proposed presently at about 10 percent of the entire land mass of this state as critical habitat for the black bear.

Thank you for your time.

Mr. POMBO. Thank you.

Mr. Bourland.

STATEMENT OF TOM BOURLAND, CHAIRMAN, BLACK BEAR CONSERVATION COMMITTEE, SHREVEPORT, LOUISIANA

Mr. BOURLAND. Chairman Pombo, Chairman Doolittle, members of the Task Force, thank you for coming to Louisiana. My name is

Tom Bourland and I am a principal in Crawford & Bourland, a forestry, wildlife and environmental consulting firm in Shreveport, Louisiana. I am a registered forester, a certified wildlife biologist and a timberlandowner. I am also a member of the Louisiana Forestry Association and Chairman of the Black Bear Conservation Committee.

My comments today focus on the plight of private landowners as they attempt to live with the Endangered Species Act. As is the case throughout much of the south, 90 percent of Louisiana's forest lands are in private ownership, with 67 percent owned by private, non-industrial landowners. This is a profoundly important issue because the majority of candidate and listed species occur on these private lands.

Current administration of the ESA makes listed species a liability for private owners. Constitutional protections are swept aside when private property is taken for the sake of a listed species without compensation to that citizen. The ESA is thus creating perverse incentives and many landowners shoot, shovel and shut up when they discover a listed species on their property. The ESA's severe restrictions can often create unacceptable economic burdens for landowners. Further, its full implementation may result in regulatory takings which raises serious Constitutional questions that must be confronted sooner or later. Even partial takings can limit the ability to generate revenue while costs are not diminished; consequently, it affects a landowner's entire financial estate, often to the point of bankruptcy. These perverse incentives motivate landowners to take actions harmful to the very species the ESA was designed to protect. Encouraging private owners to conserve listed species and their habitats is essential if the ESA is to accomplish its mission.

Recognition of this problem was a paramount concern when the BBCC was organized in 1990, the same year the U.S. Fish and Wildlife Service published its intent to list the Louisiana black bear as a threatened species. The proposal generated considerable controversy and it threatened to polarize this region, not unlike similar situations elsewhere in the nation.

The BBCC is a broad coalition of landowners, state and Federal agencies, private conservation groups, forest products companies, agricultural interests and universities working together to address management and restoration of a wildlife species. Current membership in the BBCC includes over 60 organizations. Formation of the committee was a positive action on behalf of the bear rather than a reaction to the listing proposal. The BBCC represents a new model of how natural resource issues should be addressed as public and private sector energies are harnessed together for the sake of the resource.

The broad objective of the BBCC is to stabilize and manage existing bear populations, and to restore black bear to suitable habitats in Mississippi, Louisiana and Texas. Some of our accomplishments so far:

The BBCC and the Service developed 4(d) rule which exempts normal forestry activities from ESA Section 9 consideration. This prevents the bear from becoming a liability to private timberlandowners, the habitat on which the bear's recovery so criti-

cally depends. In other words, bears can be welcome on private timberland since there is no economic penalty for providing bear habitat.

The BBCC has published educational pamphlets, posters, newsletters, a Black Bear Management Handbook, and a Black Bear Restoration Plan, all in an effort to raise public awareness.

A BBCC Coordinator position has been created and staffed.

Two Bear Management Units have been organized in the heart of existing populations as a means to actively involve private landowners in black bear recovery efforts.

What have we learned from this experience and would we change the ESA? The ESA should formally sanction regional coalitions and partnerships and delegate recovery efforts accordingly. The BBCC has done much to harmonize the process and has succeeded in keeping the collective energies focused sharply on the problem.

The ESA needs flexibility to allow new approaches. Proposed designation of critical habitat covering approximately 3 million acres has spread fear throughout the forestry and agricultural communities. Why not allow the committee's voluntary Bear Management Unit approach the chance to succeed? Critical habitat designation has questionable benefits for the bear and may in fact do great harm if private landowners perceive the bear's presence on their lands as an ultimate threat to their own livelihood.

Why not rent endangered species habitat from private owners? Renting is already a well established tool used by government to achieve national environmental goals like Wetlands Reserve and Conservation Reserve Programs. The provision for rental payments can be added without a major overhaul of the ESA, leaving the Act's application to Federal situations undisturbed.

During the first half of this century, the famous ecologist Aldo Leopold argued that landowners should be encouraged to apply conservation stewardship to their land. He concluded that the right incentives could motivate private behavior to be consistent with the public good. Consider these advantages of renting:

Renting habitat would make endangered species welcome on private land, each species would be regarded as a potential treasure, as it should be.

Renting speaks to the regulatory takings problem.

Renting purchases only those property rights needed for protection, allowing other compatible land uses to continue.

Rental agreements are agile and responsive to each particular situation. Rents can be negotiated with lower transaction costs than other alternatives.

Rental contracts can reconcile ESA objectives with our working landscape, which is dominated by small ownerships.

In conclusion, renting habitat can serve as Leopold's social mechanism that gives landowners an economic stake in conservation. In turn, many landowners themselves will search for ways to improve habitat for listed species and therefore dramatically improve ESA's implementation on private lands.

Thank you very much.

Mr. POMBO. Thank you. Mr. Pullig.

**STATEMENT OF SAM PULLIG, RED OAK TIMBER COMPANY,
CASTOR, LOUISIANA**

Mr. PULLIG. My name is Sam Pullig, I am vice president of Red Oak Timber Company in Castor, Louisiana. I am a landowner, small businessman and a member of the Louisiana Forestry Association.

In 1994, the Louisiana Forestry Association did a cover story on my continuing struggle with the red cockaded woodpecker. I regret to say that it has been over two years now since my first attempt to harvest my timber and I am still waiting on some decision from the Fish and Wildlife Service as to how I am to proceed.

In 1993, my small independent business financed the purchase of some timberland in Vernon Parish, Louisiana. I knew there were birds on the property when I purchased the land and timber, and I was prepared to leave a 200-foot buffer zone around the woodpecker nesting trees. I later learned from the Fish and Wildlife Service that this was not enough.

I am now confronted with six red cockaded woodpeckers on 137 acres of my land which is prohibiting me from harvesting \$200,000 of my timber. The Fish and Wildlife has never offered me any compensation to protect the woodpeckers on my property. In fact, they told me if I wanted the birds moved off my property, I would have to pay the Fish and Wildlife Service about \$10,000. Under the latest draft proposal, the Fish and Wildlife Service will require me to file annual reports on the relocated birds and to pay professionals to monitor 30 nesting boxes for two years on government property, and that is after I get the permit.

My cost for having the red cockaded woodpecker on my land are as follows:

The value of my timber plus the financing costs for two years; wildlife consultant fees; mitigation costs and continuing expenses for over two years. And this totals \$237,500 and does not take into consideration the countless hours spent by my employees and me trying to resolve this issue. I anticipate the costs to rise even further because I have not yet received permission to remove the birds. In other words, these six birds weighing seven ounces apiece are costing me approximately \$6000 per ounce. That is pretty expensive, even for a government agency, and something the public would be outraged over if it cost taxpayer dollars. But I am facing this alone with only my money, and I tell you I am tired and angry that I am being treated this way.

If the government wanted to build a road on my property, they would have paid me for the loss of my land and timber. With the red cockaded woodpecker, the Fish and Wildlife Service is holding me hostage with threatened lawsuits if I cut my timber and further costs and responsibilities if I agree to a habitat conservation plan that has still not been approved. The guidelines that have been presented in the proposed habitat conservation plan keep changing, each time with a greater burden on me and less to the Fish and Wildlife Service.

Our attempt to do the right thing has resulted in a two year delay in our planned harvest, to say nothing of the out-of-pocket costs and countless number of manhours. I am one of more than 100,000 private forest landowners in Louisiana who have or may

face one day the liability of having threatened or endangered species on their land. Small landowners with even less resources than I would not be able to endure this wasteful, time-consuming process or incur this expense.

Forest landowners are good stewards of the land, but are scared of government intervention on their land if threatened or endangered species settle there. This fear has forced landowners to do things they normally would not do. They are harvesting suitable trees before the red cockaded woodpecker finds them. There is no incentive for a landowner to manage endangered or threatened species, only regulation and penalties.

The Endangered Species Act is broken and it needs fixing. The inaction of the Fish and Wildlife Service is actually hurting the species. In 1992, an assortment of government agencies spent \$73 million on the red cockaded woodpecker specifically, and yet this bird is still listed as declining in numbers. Something is not working.

The power of private landowners to help restore threatened and endangered species is often overlooked and ignored by the Fish and Wildlife Service. They use threats and penalties rather than incentives and compensation to relieve the landowner of the full burden of managing these species on private land.

The Endangered Species Act needs to be rewritten to put people back into the environmental equation, and in turn balance property owners' needs with those of society.

I would like to thank you for this opportunity to comment and I will be happy to answer any questions if I can.

Mr. POMBO. Thank you.

We will open it up to the panel for questions and I would like to keep the panel—or the task force—on the five minute rule as well.

Mr. Matherne, in your opening statement, you said that you had turned in data to a government agency and they had used what you termed selective data in responding to that. Are you saying that they were basing their opinion on just part of the data that you turned in to them?

Mr. MATHERNE. That is what they did.

Mr. POMBO. Hold the microphone close so that everybody can hear.

Mr. MATHERNE. That is what they did. The device I used, turtles was not in the picture yet, it was a finfish device, the first big cage that NMFS came out with was the finfish deflector bar and all that. And some of the drags, which I picked up—I outlined everything they had and some of the drags was showing dead fish. I wrote dead fish. When you got into the shallow waters with the mud, the fish died, and they were younger fish. Well, they disregarded them drags, large amounts of fish. They was showing the percentage of finfish reduction with this device but they disregarded these drags with the dead fish.

Mr. POMBO. Have they used this data, this report, for any other decisions that they have made? Have they based any of their decisions on this report?

Mr. MATHERNE. When they put the report out and I seen it, we had a fellow at LSU in statistics look at it and Andy Kremer said

it would not make no difference if we had put the drags in or not. So somebody that was with the statistics and everything wrote a report to answer that rebuttal. And it would have made a big difference. And they just dropped—it did not come out any more.

Mr. POMBO. Thank you.

Mr. Simon, do you feel that by designating critical habitat on the black bear, that it would make a difference in the recovery of the populations?

Mr. SIMON. No, sir, I do not. I think the population is in recovery now and we do not have critical habitat designation. The people in St. Mary and Iberia Parishes where I live and where I work are doing everything possible to have the black bear's population increase. So no, I do not think black bear critical habitat designation would have any effect on the population increase in Louisiana.

Mr. POMBO. Do you know—one of the reasons why they have critical habitat is to control activity within that habitat. Do you have any idea what type of activity they are trying to control by designating critical habitat?

Mr. SIMON. I am not sure, and that is what scares me. The regulation, Section 7 and Section 9, according to the Fish and Wildlife Service, they say only Section 7 of the Endangered Species Act will affect the critical habitat area and they say it will not have any effect on private citizens, it will just have an effect on other governmental agencies; namely, the Corps of Engineers, other agencies like that.

Mr. POMBO. But do not the activities of the Corps of Engineers affect private citizens?

Mr. SIMON. They impact me, that is what I was getting to. All of the property that I farm is under pump, we have to pump the water off because of the amount of rain we have here. And I have levees all around my property and the Corps of Engineers is a major part of that. So if they are impacting the Corps of Engineers, well then the Corps of Engineers is going to impact me.

And also, I am worried about the application of pesticides to my property. Is that going to be reduced when we—the bears get into our sugar cane fields and the sugar cane grows to about eight or nine feet tall and the black bears will get in the middle of those fields when we are harvesting them, and sometimes the harvesters will kill bear—the machines we use—because you cannot see the bear in them. So of course, that is another area we are concerned about, will our harvesting be limited because of a possible black bear that could possibly be in our cane fields. So of course, I think it will impact us.

Mr. POMBO. Thank you.

Mr. Bourland, you talked in your statement about changing the incentives, and one of your ideas was renting private property as critical habitat. I think a big part of the changes that are needed in the Endangered Species Act is in changing the incentives. How have the property owners reacted to some of the suggestions that you have mentioned?

Mr. BOURLAND. I think some of the testimony you will hear today will really get to the crux of the issue. In the south, the majority of our land is privately owned. The perceptions and paranoia surrounding the Endangered Species Act, whether they are based in

fact or not, is irrelevant. If people think they are going to be harmed by an endangered species, that is the problem. Coming up with some compensation mechanisms that is a cost to cure, if you will, that addresses the situation like Sam has got, I think will go a long way to making endangered species welcome on private lands. We have restored populations like the Eastern wild turkey, the wood duck, the blue bird, all before we had an Endangered Species Act, and it was done because there was no penalty for working for these—or working on endangered species. If you put up a wood duck nest box, nobody came out and said OK, that is critical habitat, we are going to condemn your land or restrict your land. Why can we not use some of those same kind of tactics now, along with compensation certainly if the economic burden is as heavy as it is in some cases.

Mr. POMBO. Thank you.

Mr. Vento.

Mr. VENTO. Thanks, Mr. Chairman.

Rickey, you quoted the National Academy of Sciences studies in support of your position. Do you generally agree with the National Academy in terms of their evaluation of the turtle issue and the problems?

Mr. MATHERNE. I do not know if I totally agree with them, I can tell you that.

Mr. VENTO. Well, one of their observations in May of 1990, as I was looking over a CRS report, which I will submit for the record, Mr. Chairman, was that the report cited shrimp trawls as the largest human caused source of turtle mortality, possibly even three to four times the previous estimate of 11,000 turtle deaths. So that would mean they are saying that shrimp trawls are the single largest cause of the turtle death and mortality problem of adults. And of course, that would mean anywhere from 30,000 to 40,000 here a year. So I mean, that is the sort of problem that we are faced with. I mean, I know that you told us in the area that you trawl in Op, Louisiana, that there are not as many turtles there. Of course, you do not know whether the excluders are excluding them at this point or not. Obviously you have a lot of trouble with that, in the workability of it. This is the sort of concern that we have.

Now as far as the data, Mr. Chairman, you know, it is not uncommon for them to throw out the high and the low data in terms of when they are doing this type of work. And I think we should check—I think he said it was Mr. Kemp, who did that—so that we have the facts on that. So I really regret, I think, that in the personal conversations much of the specifics on how this is administered and the severity of some of the fines, because I think that we really need the cooperation of people like you, Rickey, and the other people that I met in Lafayette last night, to make this law work.

I was especially struck, Mr. Chairman, by the importance of the wetland areas as the estuary areas for the development of a shrimp last night, as we talked about the tremendous damage that has occurred there.

Let me go on, we do not have much time, but Mr. Simon—I was curious about your remark about the black bear.

Mr. SIMON. Right.

Mr. VENTO. You know, because there are a series of exemptions that exist. There is an agricultural exemption, there is—and under the law apparently you are exempted from wetlands permitting requirements. If you, incidentally, were to hit a bear with a piece of agricultural equipment or something as an accident, is there a reporting procedure that you go through or that you need to go through then, do you know?

Mr. SIMON. Yes. Well, I do not know of one that is in place. I know some farmers that have hit bear and have voluntarily reported them, you know, just to be good neighbors. But I do not know of any set procedure that we are supposed to go through.

Mr. VENTO. So you are speaking here as a farmer though, are you not?

Mr. SIMON. Yes, as a farmer.

Mr. VENTO. And farmers are pretty much exempt as near as I can see. I think you are accurate when you say that from the standpoint of Federal agencies, that there has to be consistency with regard to the Endangered Species Act. And so I think that when you are onto that particular argument, I think you have got a valid point, if it limits a project. Has the Corps of Engineers been limited? Have they been limited in terms of their activities as to services to you or others that you know of? Can you testify to that?

Mr. SIMON. Not yet, because critical habitat has not been designated, sir.

Mr. VENTO. No, but private property is not affected unless you are going to be in commercial development. Are you going to be in commercial development?

Mr. SIMON. Well, my land is all under pump, it has levees all around it. How am I supposed to maintain them if they have a tree on it and it has a black bear nest in it?

Mr. VENTO. Well, my point is, has the Corps of Engineers been limited?

Mr. SIMON. Not yet.

Mr. VENTO. Mr. BOURLAND, the question I had for you is really I guess more of a woodpecker question, but the issue is that some of the states, several states—Alabama, Georgia and South Carolina—have already had habitat conservation plans statewide. In fact, it is almost essential because there is little public land in states even like yours. Would you be supportive of a statewide plan in Louisiana? Why has Louisiana not developed such a statewide plan on some of these species?

Mr. BOURLAND. I think Louisiana has had a wait-and-see attitude about this. Certainly HCPs, because of their cost, are beyond the reach of a lot of small, private landowners. If you happen to have an RCW colony and you only own 40 acres, an HCP would be very, very difficult and expensive to attain. There needs to be a statewide situation where landowners like that could subscribe to an HCP, something that allows them remedy under the law.

Mr. VENTO. Well, the woodpecker has been designated since the early 1970's as an endangered species or threatened species. So you are going to wait and see?

Mr. BOURLAND. Well, I cannot speak to why Louisiana has not formally availed itself of that process.

Mr. VENTO. But you would be supportive of that, sounds like you are supportive of a statewide plan in terms of dealing with this, but there are some glitches, is your point.

Mr. BOURLAND. Absolutely.

Mr. VENTO. That is your testimony.

Mr. BOURLAND. I think these kinds of new approaches and flexibilities are necessary.

Mr. VENTO. Finally, Mr. Pullig, were you aware of the fact—you just bought this land recently, I understand.

Mr. PULLIG. Yes.

Mr. VENTO. Were you aware of the fact—I mean obviously the woodpecker has been listed, as we said, since the early 1970's. You know, I assume you were aware of that when you bought the land, that it had that impact on it. There were any number of sightings, this is not something—I mean it is public information, is it not?

Mr. PULLIG. Yes, sir, I was aware there was red cockaded woodpeckers on the land. My opinion was that the land, if it has red cockaded woodpeckers on it, should not affect the value one way or the other, and also I am not breaking any law by buying the land that has red cockaded woodpeckers on it.

Mr. VENTO. No, but I mean how did you—where did you get the information, you assumed that you could simply have a buffer zone around the nesting trees and that would be appropriate—where did you get that information? Was that another one of your assumptions?

Mr. PULLIG. I talked with different biologists and there was no set plan on how to handle it. We would get a plan—in fact, the people that I worked with out of Lafayette, we had several different plans that would work. Then they would leave Lafayette; they would go to Jackson, Mississippi, they would shoot them down there; they would go to Atlanta, Georgia, they would shoot them down there. So we have had different plans that have been sent to higher up people and they would not accept them. If we had the opportunity to work on the local level with the Federal officials here, our plan would already be in place and the problem would be over with.

Mr. VENTO. Well, thank you. Thank you, Mr. Chairman, my time has expired I see.

Mr. POMBO. Mr. Doolittle.

Mr. DOOLITTLE. Mr. Matherne, what do you think would work to deal with the turtle problem? Obviously, there have been a number of problems with the TEDs. What would you recommend instead?

Mr. MATHERNE. I recommend to find the problem why the turtles are still washing up when we have got 98 percent compliance with TEDs. We keep pointing the finger at this TED, pull the TED, the shrimp will pull the TED but at 98 percent compliance the turtles are still washing up on the beach as they did before TEDs. There is some other problem that is causing these turtles to wash up.

Mr. DOOLITTLE. So you are saying that even before we had the TEDs, we were having turtles washing up; and now we have the TEDs and they are still washing up.

Mr. MATHERNE. Same amount. It is just like the figure that Mr. Vento said just now, 40,000 turtles—let me tell you something, National Marine Fisheries would not do a survey on the waters of

Louisiana in the Gulf because it takes too many manhours to catch one turtle. They themselves said it was rare. That 40,000 turtles is an extrapolated figure. If one boat catches one turtle, they multiply it by everybody's boat. That is how they keep up with that figure. And you cannot do that, it does not work like that. They would not even do a survey off Louisiana because it would take too many manhours to catch a turtle.

Mr. DOOLITTLE. Mr. Simon, if your property were part of the critical habitat area, would you be concerned about your ability to obtain 404 permits or other Federal approvals?

Mr. SIMON. Yes, sir, I would be extremely concerned. I am not looking at developing any more wetlands, but I am looking at maintaining the land that I have, and if necessary, redo the levees, maybe increase their height to protect against the water, which I will need permits for. Of course, I am extremely concerned about the 404 permits.

Mr. DOOLITTLE. Mr. Bourland, the BBCC has frequently been cited as a model for bringing about recovery of a species in a manner that respects private property. What do you think would happen if the Fish and Wildlife Service were sued by some group to force even greater restrictions to protect the bear? Do you believe the BBCC recovery effort would be enough to prevent such a suit and to prevent injunctions under current law to impose additional restrictions under the Endangered Species Act?

Mr. BOURLAND. I think that one of the successes of the committee is that there have not been any lawsuits filed. Those who have stepped forward and raised issues, we have invited them to the table and said come, let us see what kind of common ground we can build on. Anything that you do that threatens private landowners causes us concern, because you are not going to recover a species in Louisiana if you do not have the 116,000 private landowners working with you. If you have them working against you, then you are really fighting an uphill battle.

If we had a third-party lawsuit come in, it would be a roll of the dice to see what happened, but it would certainly hamper our efforts. It would certainly further alienate our private landowner constituency, and that is what we are very concerned about.

Mr. DOOLITTLE. Given the way the law is drafted and the implementation in other parts of the country is it your belief that such a suit indeed would or could cause you significant problems?

Mr. BOURLAND. I think that that is beyond any doubt. Again, what we would like to see is a chance to see if the model will work, if it will operate. Critical habitat designation, the Bear Management Units that we have in place are strictly voluntary and it is based on the efforts of private landowners who live closest to the population centers. It does not matter how much good we can do if private landowners like Mr. Simon do not think our best interests are in concert with theirs. And for the sake of the bear, that is what we are trying to accomplish. We do not want it to become a liability. Critical habitat designation right now, currently the proposal does not include agriculture as bear habitat and we are working within the Act to try to draw out these exemptions and speak to the problem and not speak to—or not increase everyone's paranoia. But how much can you trust the circumstances, certainly as

we have seen it develop in other parts of the country, I think you can work with the Fish and Wildlife Service. We have had a lot of success working with the Fish and Wildlife Service. Third party lawsuits, that is a variable we cannot account for. But I think there is a growing different attitude within the Service to look at private property. I think many, many officials realize how important private property is to this whole issue.

Mr. DOOLITTLE. Thank you. Mr. Pullig, what reason were you given for not being allowed to have a 200-foot buffer zone around the trees?

Mr. PULLIG. Needed more foraging area and just exactly, you know, different reasons, but mainly more foraging area, more area for the birds to—for the foraging area.

Mr. DOOLITTLE. So 200 feet was unacceptable but 250 feet was acceptable?

Mr. PULLIG. No, they went from 200 feet around each tree, which is what we wanted to do or proposed, but that is when we come into a 137 acre area with a 50 basal area in about 90 acres of it and 40 acres as a 10 basal area for the foraging area.

Mr. DOOLITTLE. Thank you.

Mr. POMBO. Mr. Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Matherne, when asked the question of what is wrong with these regulations, asked a question in return. He said well, if we are 98 percent in compliance with these regulations and sea turtles are still washing up, why are we being blamed, why do we still have to carry these TEDs. The Service answered that question in a biological opinion dated November 14, 1994, and if Mr. Matherne was worried about them using selective data in the past, let me tell you what we are up against right now.

That biological opinion is now the subject of a lawsuit that threatens down all commercial fishing in the northern Gulf of Mexico. This is the language in that report—Mr. Matherne, I know you have looked at it with me. What the report says is that the simultaneous red-tide bloom, fish kill, dolphin die-off and an apparently compliance with the TEDs regulation confounded the attempts of NMFS scientists to determine the cause of sea turtle strandings in Texas in 1994. They ended up on page 13 of the biological opinion, and I quote, "Conclusion: There is no information to determine precisely why catch rates of sea turtles, especially Kemp's ridleys, appeared to increase in the northern Gulf of Mexico during 1994." But then the biological opinion concludes "In summary, the major apparent cause of the strandings is the incorrect installation and improper use of TEDs by shrimpers in the Gulf of Mexico." If this is not Alice in Wonderland kind of reasoning, I would like to know what is. They say in one part of the report they cannot find out why the strandings occur, there is no information to determine what caused the Texas strandings. There is full, almost 98 percent compliance, and so they say, therefore, we blame it on the shrimpers.

Mr. MATHERNE. When shrimping was closed out 200 miles.

Mr. TAUZIN. When shrimping was closed for 200 miles during, in fact, the months of May, June and July in 1994 when these strandings occurred. Well, we had some strandings this year, Mr.

Matherne, we had some in Texas this year. Only this time, somebody reported properly that there were dredging operations in the area. This is a letter from Mr. Andrew Kremer, this year, it says, "At that time, none of us were fully aware of the extent of the strandings or the causes, although it was fairly certain that at least some were due to the hopper dredge."

I have got reports, by the way, turtle-by-turtle—turtle-by-turtle. And here it is right here on these strandings in Texas this year. "No head on the turtle", "carapace gashed", "turtle cut in half", "turtle in half", "carapace breached", "no head on the turtle", "gash in carapace, missing on right side". Those do not sound like drownings in a net to me. Do they sound like that to you, Mr. Matherne?

Mr. MATHERNE. No. And Congressman Tauzin, if them turtles would have drowned with parts of their body cut off, I do not believe they would have floated to the beach because they would not be able to float.

Mr. TAUZIN. That is correct. They probably would not have floated to the beach had they drowned with part of their body missing. But the bottom line is that we are finally getting a little evidence that something else is causing these strandings, but here is the problem, the problem is that because of this biological opinion, suits have been filed and they are about to enter a consent judgment, a friendly suit brought against the government by an environmental group that says, "Because you issued this opinion now, you have to shut down fishing in the Gulf of Mexico." A report based on Alice-in-Wonderland logic. We cannot find what is causing the stranding, so we blame it on the fishermen. And reports coming in now that turtles are being killed by dredges. Does that make sense to you, Mr. Matherne?

Mr. MATHERNE. No.

Mr. TAUZIN. Mr. Simon, with reference to the black bear, you asked a pretty good question. Someone asked you just now if the black bear critical habitat is designated, what activities that you now engage in will you not be allowed to engage in. Have you asked that question of the agency who wants to impose this critical habitat on Louisiana?

Mr. SIMON. Yes, we have asked it.

Mr. TAUZIN. Have you gotten answer?

Mr. SIMON. No.

Mr. TAUZIN. You have not gotten answer?

Mr. SIMON. No, we have not.

Mr. TAUZIN. No one will tell you what activities will be prohibited if a critical habitat is designated. Is that correct?

Mr. SIMON. Yes, sir.

Mr. TAUZIN. What have they—when we and you and I have asked them why are you doing it, what answer do we get?

Mr. SIMON. Well, the answer is supposed to be to increase the bear population. That is what I assume it is to be. And, you know, we are concerned about the clause in the ESA that says "harassing the bear". Well, what is harassing the bear? You know, if my tractor passes by a field that has a tree next to it with a den of bear in it, is that harassing it?

Mr. TAUZIN. We know the experience of the spotted owl.

Mr. SIMON. Yes.

Mr. TAUZIN. The answer was you cannot cut down any more trees, you have got to shut the mill, you have to quit operating. We know the experience of the kangaroo rat. The answer was do not protect your homes because the rat's home is more important than the family in California.

Do you expect you will get the same answer if critical habitat is designated in Louisiana?

Mr. SIMON. That is what I am afraid of.

Mr. TAUZIN. Finally, Mr. Bourland, my time is up, but I just want to say a word of congratulations. When we have the chance to cooperate—landowners, government agents, everybody cooperating—you have seen black bear populations increasing, is that not correct?

Mr. BOURLAND. That is correct.

Mr. TAUZIN. And that is the story of Louisiana, the black bear population is on the rise.

Mr. BOURLAND. Intuitively we feel that it is. We are seeing more sightings, but the data is not yet in. We have got a lot of studies out there, a lot of radio collars on bears.

Mr. TAUZIN. If I can add my one little sighting, I saw my first black bear this year—it was exciting. They are growing in numbers, voluntary efforts, and yet we are being told they are about to impose a new regulation on us and will not tell us what we will or will not be able to do as a result. That is the kind of cooperation we get from government agents too often.

Thank you very much for your testimony.

Mr. POMBO. Thank you, Mr. Tauzin. Mr. Cooley.

Mr. COOLEY. Yes. I want to thank the panel for coming today. I want to say something to you, panel, so you can understand this.

The reason we are having a lot of these hearings, I hope you understand, is because of the tremendous amount of people elected in the west. If you look at the matter of the people here on the panel, we have been affected by the same thing you are going through, for over 20 years, finally realizing how devastating it has been to our economic growth and changing the life that we have in the west. And because of the new, quote-unquote, freshmen to the United States Congress, we are pushing this issue. By looking at the people here, you can understand that we have been living through it a long time and now you are starting to feel the same effect.

They talk about different issues. We do not have any different issues, we have one main problem—we have a bureaucracy that is not flexible. And in that lack of flexibility, is shutting down our economic base throughout this entire country. We felt it primarily quicker than you did because they had more control over public lands, and now they are starting to affect private lands and you are going to see this continue, to see the type of thing that we have been going through for 20 years—you are starting the effect here, and I think we are going to get something done. We must change the Endangered Species Act. No matter what the other people say, it has to be changed or it is going to shut down our economic base in this entire country, not only logging and ranching, but in fishing and timber and sugar cane and everything. So really remember

that we all really have the same problem with the bureaucracy, it is just in different areas.

Rickey, you know, I spent a lot of time reading your first letter that you put out, really enjoyed reading your handwritten subscription. I found something when I was going through this that you need to educate me on and maybe the people on this panel. Maybe some people even know the answer.

How close and how much effect does the Mexican fisherman have to do with the Gulf? How close is he fishing in your district, or is he really held off 200 miles?

Mr. MATHERNE. The Mexican fisherman?

Mr. COOLEY. Right.

Mr. MATHERNE. They are 200 miles. The Mexican fishermen get down toward the border of Mexico and Texas. As far as the Mexican fisherman getting into our waters, I really do not know.

Mr. COOLEY. I saw something else in your original hand thing. It said when you turned in a report to the Marine Fisheries, they talked about looking at your catches. And I understand that you did something like 56 drags and you never picked up one turtle in all that time, is that correct? Is that what I remember?

Mr. MATHERNE. We have never picked up a turtle. And in the Gulf, which is very rare to catch a turtle, the turtles we do catch when we do catch them, we return them back in the water alive. We have to leave them on the deck awhile if they are comatose or something, but we do return them back in the water alive. The rare turtles that we do catch. And that is NMFS saying that, himself, it is very rare. They had to take the turtle data from the east coast, the Atlantic coast, and apply it to the Gulf, to have a case as far as turtles go, as far as turtle captures.

All these boardings—that is another thing about this whole deal—if we are the cause of all these turtles washing up, the Coast Guard has never boarded a boat and caught a turtle. Let me tell you something, when the Coast Guard boards our vessels, they get on the boat before we even start picking up our rigs. They get on the boat and when that trawl comes to the side, they are right there. With this TED, they are saying this bottom shooting TED, we are catching a turtle and they are falling out as we are rolling them. It does not work like that. Nothing moves out of that until you pick that net up. When you pick the net up, then the TED goes straight down, then the stuff will come out, some grass, sticks, whatever you have right there. They have never boarded a boat and checked them and found a turtle in a net or a TED.

Mr. COOLEY. So most of the studies done affecting you in the Gulf are really done on the Atlantic coastline?

Mr. MATHERNE. They used the data from the Atlantic coast and applied it to the Gulf. And I asked Any Kremer why and he said well, we cannot put enough manhours in the Gulf to catch a turtle.

Mr. COOLEY. I see. Thank you, Rickey.

Mr. Simon, I am in the cattle, timber, agriculture business, as you are, and we have been affected in the west. Did the Fish and Wildlife Service ever give you any—did they ever do any counts to know what a baseline is for the recovery of the black bear? Has anything been done? I read in your thing you said crude or estimated. I mean, no baseline?

Mr. SIMON. They are trying to—and Mr. Bourland may be able to comment a little bit better than I—but I know that they have been on the property that I farm and that they are looking for black bear. They have had a hard time looking for them because of the nature of the beast. The animals are very secretive, they come out at night, they do not like to be around humans, so they are having a hard time locating them. But where they have located them, they have found very good populations, they have found populations that are on the increase.

Mr. COOLEY. OK. I am running out of time, so I am going to jump to Sam right away since we are both in the timber business.

Sam, really did the Federal Government, Fish & Wildlife, come and say to you that if you spend \$10,000 of your money, move these birds onto government property and maintain them for two years, they would allow you to do that?

Mr. PULLIG. Well, what is happening is that things change every week and even—when I wrote this speech, that was the way it was. But even last Friday, it has changed again. Now it is three years that I have to monitor these 30 nesting boxes on government land and at the end of three years if no red cockaded woodpecker settles in these nests and a breeding pair does not settle in one of these 30 nests, then I have to go out on other private land and buy a pair of red cockaded woodpeckers and put them in one of the nests, and also a single adult, and put them in a red cockaded woodpecker nest. So what they want is a guaranteed success in the habitat conservation plan.

Mr. COOLEY. So that was a condition of being able to harvest your property?

Mr. PULLIG. Yes, and I am here not knowing—if I think it is wrong and I say look, you know, I do not think this is right, now what are they going to do? Are they going to say well, think about it the next 18 months? And what control do I have, what input can I put in this thing?

And really there are some people in Lafayette in the United States Fish and Wildlife Service that knows the problems that we face and knows that they need to be changed. And if we can work with those people, we can help save the bird. But right now there is only regulations, only penalties. Offer incentives to the private landowner, private forest landowner, and do not come in and take control, because no one wants to see their land—and this is a time-consuming process. It has been going close to two and a half years, and then with three more years of monitoring. So I am in this for five and a half years. You know, the 65, 70 year old landowner with 40 acres—can he wait five and a half years, can he spend \$20,000 to get his timberland back?

Mr. POMBO. Thank you.

Mr. COOLEY. There was a suggestion that you could raise these for the government and then put them on different government property. Was that ever a suggestion made to you by the Fish and Wildlife?

Mr. PULLIG. Raise them? At one point in time, they wanted me—there was a plan that if you have, say—like I have six red cockaded woodpeckers. I have to keep those on my land until I raise six juve-

niles to replace those that will be taken. But never was I offered any compensation to raise the birds. It was at my expense.

Mr. COOLEY. Than you.

Mr. POMBO. If they paid you \$6000 an ounce, would you?

Mr. PULLIG. Sir? Yeah, I might do that.

Mrs. POMBO. The gentleman's time has expired. Mrs. Chenoweth.

Mrs. CHENOWETH. Thank you, Mr. Chairman. Let me say that I too come from the northwest where we have experienced snails being listed the size of number one buckshot; the spotted owl; the salmon that you can still buy at the store in cans. So it seems that we are all laboring under a law that is inconsistent and onerous as far as our ability to make a living and the right to rely on one's word.

Mr. Pullig, all of your testimony to me was very compelling and especially the fact, Mr. Pullig, that you relied on people's word before you bought the acreage. And I certainly think that we ought to have the ability for people to have an agreement and rely on a man's word, and it ought to be carried through and respected by all agencies. I hope some day we will be able to return to that, because America was built on a handshake.

Mr. PULLIG. Yes, ma'am, and I was raised to believe and still believe that you pay your taxes, you live by the laws of the land, obey the law, the government is there to protect and serve us. That is the way I believe and I still think—this is not—it is a solution that could be solved, I think reasonably quickly if you get the private landowners' input, because there are so many private landowners in Louisiana, you get our input on this, the government input—you know, it is not like the government people that I am working with are bad people. They are good people, I have become friends with them. But they are handed down regulations from Washington, Atlanta, Jackson, and they are paid by the government, so therefore, they are having to enforce them, and sometimes they know that these are not in the best interest of private landowners.

Mrs. CHENOWETH. Let me ask you, have you ever had the opportunity to have input, ever, with regard to the decisions that are being made that will have ramifications on your property and your ability to make a living?

Mr. PULLIG. Have I what, now?

Mrs. CHENOWETH. Have you ever had input into the process of the decisionmaking by the agencies? Have they ever called you in, sat you down and said what kind of losses do you think you might experience, what do you think about our setting aside certain areas for the red cockaded woodpecker? Have you ever had that experience?

Mr. PULLIG. I have sat down and discussed it with them on the local level, you know. And really, they realize and they will tell you right now that I have done what I am supposed to do and more to solve the problem. But that input—I think they have listened to some of my input, but like again they have to go back to the rules and regulations that is handed down to them, and really my input, they cannot use. The biggest thing that I feel like is wrong, you have got a species there with a \$70 million budget and yet they are still asking me to spend \$10,000 of my money to move the birds. I feel like I have a responsibility, and everyone has a responsibility,

if they see an endangered species, to report it to the proper authorities. That is where it begins and that is where it ends. I feel like the government should take over from there.

Mrs. CHENOWETH. I think you are very right on that.

Mr. Matherne, like I say, I am from the northwest, and I am not real familiar with the shrimping industry. But you are the captain of your ship, you own the ship?

Mr. MATHERNE. I am part owner and operator of my shrimp boat.

Mr. TAUZIN. Part owner and operator. I have to translate the Cajun accent.

[Laughter.]

Mrs. CHENOWETH. We have got those funny accents up there in the northwest.

Mr. MATHERNE. When I went lobbying the halls of Congress with this Endangered Species Act the last time that the shrimpers went there, I would go into the Congressman's office and say I would like to speak to the person in charge of Endangered Species, and the secretary would say what? I would say I would like to talk to the people in charge of the Endangered Species. She said what? She said oh, I just like to hear you talk.

[Laughter.]

Mrs. CHENOWETH. I agree. Let me ask you, is both the Coast Guard and the National Marine Fisheries Service acting as enforcement agencies? I notice that you said they both board your ship to inspect the TEDs.

Mr. MATHERNE. Yes. Sometimes the Coast Guard will board with just Coast Guard personnel and sometimes they will board with NMFS personnel on their boat with them.

Mrs. CHENOWETH. Do they ever ask your permission?

Mr. MATHERNE. Yes, they will ask permission.

Mrs. CHENOWETH. OK. Mr. Simon, I wanted to ask you too, as a landowner when people come out and make surveys of your farm and your ranch, do they ask permission to make the surveys?

Mr. SIMON. Yes, ma'am. They have been cooperative and we have been more than cooperative I feel with them. I used to work for a large sugar mill in south Louisiana and Dr. Richard Price, who was doing the surveys, would come on the property. We would give him molasses from the sugar mills because the bears like molasses, they would come to it. We cooperated, I felt, in every way possible. When one of our harvesters killed a bear in 1992, we contacted them. We have done everything possible to help them. But now, we are having this thrown back in our face. But yes, they have been nice about it.

Mrs. CHENOWETH. Well, I notice that my time is up, but I have one quick question. What would happen if you said no?

Mr. SIMON. I do not know. There might be a court order forcing me.

Mrs. CHENOWETH. OK, thank you.

Mr. POMBO. Thank you. Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman, and I too appreciate the panel being here today. I am from California. I am landlocked, so I am sorry I do not understand issues such as shrimp. This is all news to me that I have heard this last couple of days.

But I want to tell you a story about a water project in my district where some reform came down in 1992. They required a study on what they called the San Joaquin River watershed in the district. They required a report in 1996 that would explain how they would re-establish a fishery in the district, which would mean taking water away from farmers who were using that water in a water project. A fishery does not mean a commercial fishery, it means a stream with fish in it. And the project was supposed to end up being reasonable, prudent and feasible in its approach to the re-establishment of that fishery. I can tell you that the mere thought of the study made it harder for farmers to get loans, thus it devalued their property. Just because the Federal Government had not done anything yet or had not imposed the regulation did not reason farmers reason to sleep better at night. The fact was that the regulation was on its way. With the current momentum of environmental restrictions and regulations, it is a little difficult to presume that this would not continue.

Mr. Simon, I would like to change reality for a little bit. If you had a system in which the Federal Government was not as intrusive as it is right now—and what I want to say too is that the Federal Government is a poor substitute for individual stewardship, conservation and personal responsibility. And what we are going through across this country with current environmental legislation is a perfect example of government inability. It is ridiculous that the government attempts to apply the law uniformly over this land. Just by collecting information on this tour and studying, the individual application of the law, or its application to certain areas by a bureaucracy, we find that it simply does not work.

And I guess my question to you, Mr. Simon, and also to Mr. Bourland, if this tide of Federal stupidity was over with—and we have all learned from how ineffective and in the way and ridiculous this bureaucracy is right now—having known that, saying it was gone now with the threat of over-regulation and this bureaucratic nightmare on the horizon, would that give you the incentive to work in groups like Mr. Bourland. And saying, if you had an agency that said listen, you have got a decreasing bear population, would that decrease not give you an incentive to work with groups in order to encourage personal responsibility, good stewardship, and conservation. We all like to think every entrepreneur and businessman in this country has personal responsibility and good stewardship. With the threat of an onslaught of Federal regulation like this Endangered Species Act, would it not cause you to want to take care of that problem on your own?

MR. SIMON. If I lived in Utopia—and that sounds like what you are describing—I am all for the black bear, I want it to thrive on my property. I think it is neat. I have never seen a black bear on my property, but I know they are there. I see the footprints, I have seen where they have eaten some cane. And that does not bother me, I would like them to be there, and I would love to be able to cooperate with maybe the black bear conservation committees, maybe some other groups, not all groups.

MR. RADANOVICH. Yes.

MR. SIMON. And have them come on my property and show them the bear. Maybe take children out there from local schools and

show them. I would love to be able to do that, but I am not going to do it now.

Mr. RADANOVICH. Yes. I come from a town of 2000 people and I sat both on a planning commission and a county board of supervisors for about four years. And they were talking about issues such as yours at the local level. I do not know shrimp, sir, I am sorry, and I do not know, in some ways, why I am even here listening to your problem because it should be handled on the local level. That is what we are trying to stress back in Washington. Being one of the new members that was elected in November, reminds me that you cannot solve local problems from Washington. It just does not work that way. What we are trying to do is encourage personal responsibility by returning control to the local level and privatizing some of the things that Washington controls.

I am sorry, but I do not know how to solve your problem as well as you might on your own, and with local authorities who are closer to the problem than I am. I am a landlocked district. And it seems to me that a lot of the problems that you all have gone through, will be a lesson that when all this Federal bureaucracy goes away, and when we go through our budget-cutting processes, you will learn to solve these problems on the local level. The big threat on the horizon is the return of a nightmare like this.

Thank you.

Mr. POMBO. Thank you. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman. I appreciate the panel being here. I come from the plains of west Texas, we do not have any shrimp and we have some sugar beets, no sugar cane. We sure do not have any timber, I will guarantee you, we have some scrub mesquite. But it is helpful for me to hear how this Act has been affecting you all. It has been affecting my farmers and ranchers in some different ways, but sometimes with some similar results.

I come to some of the same conclusions that the gentleman from California just mentioned. Number one is that the only way to deal with this responsibly is to let folks at the local level deal with it. There is no way that the folks in Washington are going to write a set of regulations that is going to apply to my farmers and the sorts of situations you all have to deal with, plus the folks from the northwest and all the way to Maine. We have got to have, it seems to me, some local flexibility to deal with the situations.

But I am very intrigued by Mr. Bourland's testimony and also some comments Mr. Pullig made about having incentives for landowners to work with us in protecting these species. It kind of gets back to that old deal you can lead a horse to water but you cannot make him drink. You encourage him and make him want to do these things, which to me means it has got to be voluntary and there has got to be some incentive to make him want to do it. If you could do that, you could do all kinds of good, rather than the landowner being in a very adversarial position from the government, which is where we are now.

And I would appreciate both of you gentlemen, or any of you, commenting on what you think the chances are of landowners being willing accomplices to protecting species if we do not make

it mandates but we provide incentives and voluntary kinds of co-operation.

Mr. BOURLAND. I think there are just many, many wildlife success stories out there. Landowners are not anti-wildlife. But they do want the freedom to be stewards of their resource. They want the freedom to do what is in their best interest, but that inherently for a landowner means taking care of that land, the resources that are on it. We have restocked most of this nation for game that was depleted from game from private reserves—not government refuges, but private reserves. And that has always been a heritage of this country. It could still be a heritage. We can have woodpeckers, we can have timber, we can have black bears and we can have sugar cane. But you cannot do it if you make these animals, these specific animals a liability to that landowner. You take him from a volunteer, an advocate, someone who wants to work with wildlife, and you put him on the other side of the fence. I have been working with endangered species and private landowners for 19 years. As an advocate for wildlife, when I go out to work with a landowner under the Endangered Species Act, I have nothing I can sell. I cannot encourage that landowner to come over to my side if he stands to lose his livelihood. It just will not work.

Mr. THORNBERRY. No carrots in other words, only sticks.

On that note, let me ask Mr. Matherne this question. Tell me how these devices affect your ability to earn a living. I mean what effect does it have on your catch, and can you give me an estimate of what percentage of your catch you lose because these devices are there.

Mr. MATHERNE. I will tell you overall right now I am losing about 15 percent. Our problem here in Louisiana is the water bottoms, the debris. Congressman, you was not there yesterday, these people came down and we had pictures of the debris we are talking about, the grass, different fish that is in the Gulf that is blocking up the TEDs. Where you could pull a TED on the sea bottom as this floor right here where it was tested, very little problem. Our problem comes with the debris and the discharge of the Mississippi and the Atchafalaya River, the logs. When you are dragging and that gets caught in the TED, you stand to lose the whole drag.

Mr. THORNBERRY. Well, how does that 15 percent compare to your profit that you try to get above your expenses?

Mr. MATHERNE. Well, that is all our profit. When I used to go trawling, two weeks is a normal trip. Now we are spending 25 days trying to make up for this 15 percent loss. When I leave the dock, I do not know when I am going to come back. It is not like you are going to pick up a paycheck. You are going to go out there and hope you are going to catch something. You hope that within now 25 days, I can come in from my trip. I am just a fortunate one to have a freezer on my boat. And you cannot compare me fishing compared to the rest of the fishermen. We are all different. This man here might not have a freezer and can only stay so long. His loss is going to hurt him more, where I can stay longer with the freezer and try to pick up what I need to pay my bills. In other words, I can stay longer to make my ends meet, where this man without a freezer, and he is losing the same amount of shrimp as

me, but it is hurting him worse than it is hurting me. So it is a different situation for the fishermen.

Mr. THORNBERRY. But the bottom line is for you or the other fellow that does not have a freezer is whether he can earn enough to earn a living for his family, and that is what this is hitting at.

Mr. MATHERNE. The shrimp is a perishable product. You know, you can only stay so long with shrimp if you do not have a freezer. You know, he is losing a certain amount, a different size boat only holds a little bit of fuel. Let me tell you something, I have seen families break up, I have seen people's homes repossessed, I have seen boats repossessed from this TED regulation. And plenty of people have went out of business with it.

Mr. THORNBERRY. Thank you.

Mr. POMBO. Thank you. Mr. Metcalf.

Mr. METCALF. Thank you, Mr. Chairman. The questions I had written down have all been asked already, so I am going to just make a really brief statement.

I think we can—I like the idea of the incentives all down the line, government should work—we have tried that in Washington state with habitat things and it has been successful.

I think the government agencies are acting largely, or to a certain extent, without real solid information—real solid scientific information. And they are acting and imposing terrible fines and they are doing these things, and a lot of times, they really do not know what they are doing.

Let me give you a quick example. The Columbia River has an endangered sockeye run, very serious trouble that sockeye run is in. So they say the solution is to spill more water over the dams, huge amounts more water, spill it and do not make electricity out of it, at huge cost to the electric ratepayers and to the barge traffic that needs a certain level of water in the off times. I think it is the same with the turtles as with the salmon. They do not really know—to my knowledge, and I may have missed it—but to my knowledge, no scientist or biologist has signed his name on the line that spilling all that water is going to help. They say well, we think it would be a nice thing to do and we think it may help. Millions of dollars and great cost. And that is the problem from what I saw with the turtles. There are not as many turtles around in your area as they say, but they still require all this stuff because they do not know for sure.

I think the government agencies owe—owe—to the public to really know before they impose regulations at huge costs. And I guess I think we could pay an awful lot of incentives and so forth by cutting the bureaucracy in Washington, D.C.

Thank you.

Mr. POMBO. Thank you. Mr. Longley.

Mr. LONGLEY. Thank you, Mr. Chairman. And again, I want to thank the panel for the time and effort you have put into preparing this very valuable information.

Mr. Matherne, I would like to ask a question: How long have you been fishing?

Mr. MATHERNE. Right now, 23 years.

Mr. LONGLEY. And let us talk about the 18 years that you were fishing before you had to start complying with TEDs. How often would you find a turtle in your nets?

Mr. MATHERNE. Once a year, sometimes we go two years before you see a turtle.

Mr. LONGLEY. And so maybe once or twice a year?

Mr. MATHERNE. Yeah.

Mr. LONGLEY. So, could I assume for that that maybe you had seen 30 or 40 turtles over the 20 years before you started having to comply with TEDs?

Mr. MATHERNE. I do not believe I have seen that—very few turtles. And the turtles we seen before TEDS—and I cannot explain why—was the loggerhead turtle. When TEDs came out the Kemp's ridley, we see the little turtle, every now and then you see one of them. This turtle has no tag, it is not from the head start program. You know, where is it coming from?

Mr. LONGLEY. How often would that turtle be dead?

Mr. MATHERNE. Be dead? You are asking me how often is the turtle dead?

Mr. LONGLEY. Right, of the turtles that you have found, what percentage—

Mr. MATHERNE. I have never caught a turtle that was drowned in my nets.

Mr. LONGLEY. Never, not in 18 years of fishing?

Mr. MATHERNE. I have never caught a drowned turtles, my turtles went back alive.

Mr. LONGLEY. Never a single turtle. Now let us talk about the last five years: How often has a turtle turned up in your nets?

Mr. MATHERNE. I have had one caught in a TED with some debris and he was still alive.

Mr. LONGLEY. And what did you do?

Mr. MATHERNE. Let him go. Just picked up the net and he left.

Mr. LONGLEY. You do not have anything against turtles, you would just as soon like to see them swim.

Mr. MATHERNE. Oh, no, I do not have nothing against turtles.

Mr. LONGLEY. OK, let me ask another question. You mentioned that you had prepared log reports and submitted them to NMFS.

Mr. MATHERNE. That is correct.

Mr. LONGLEY. Do you have the documents that you submitted and potentially a copy of the documents that you saw in the official record that excluded the information that you submitted?

Mr. MATHERNE. I do not have the document with me today, but I have it somewhere at my house.

Mr. LONGLEY. Would it be possible to find that document?

Mr. MATHERNE. I am going to get it because one of the other Congressmen asked me for a copy of it too.

Mr. LONGLEY. Well, to the extent that your data has been misrepresented, I would like to be able to follow up on that.

Mr. MATHERNE. OK.

Mr. LONGLEY. And I have got a final question for each of the panelists. And this has been very helpful for me.

What each of you seems to be saying, and particularly Mr. Matherne probably the most assertively, is that there does not appear to be any scientific basis for the determination of

endangerment that has been made, at least in your specific areas. Is that true?

Mr. MATHERNE. That is correct.

Mr. LONGLEY. Could you each respond to this?

Mr. MATHERNE. That is true with us.

Mr. LONGLEY. And you mentioned specifically that there has been no scientific study whatsoever of the Gulf.

Mr. MATHERNE. They did testing with TEDs in Louisiana waters, but they could not do a survey to see how many turtles was there, how rare the turtles was because it would take too many manhours to catch a turtle. They would not even do a survey—never did the survey in the state of Louisiana. They could not keep it to the state of Louisiana, they could not keep it to the central Gulf, they had the western Gulf, central Gulf, eastern Gulf and there was not enough turtles there. They had to combine that with the east coast.

Mr. LONGLEY. To the best of your knowledge, has there been any study that indicates that Kemp's ridley turtle was ever present in significant numbers in the Gulf?

Mr. MATHERNE. Not to my knowledge.

Mr. LONGLEY. And to follow with each of you, any scientific studies that you are aware of that have quantified the population—that existed in the areas that you testified about.

Mr. BOURLAND. The bear was listed as threatened without good solid numbers on what the actual population was.

Mr. LONGLEY. But anecdotally, the population increased before the designation, is that correct?

Mr. SIMON. I think so. In our—you know, talking about black bear, yes. The numbers seem to have—they are on the increase, the population is thriving but the studies that have been done are very crude and they are not based on real good science, I do not believe.

Mr. LONGLEY. Now Mr. Pullig, I think you submitted an article that suggested that—and I realize you may not have written this—but suggested that the population of the red cockaded woodpecker has actually increased, primarily due to private landowner efforts, is that correct, over historically?

Mr. PULLIG. I am not that much aware of the population. It would definitely be increased with more private landowner input, because I know there are red cockaded woodpeckers out there that are not being reported because of the fear of reporting them.

Mr. LONGLEY. And one final question. Would it be fair to say that the system—that your testimony is that the system that has been set up under the Endangered Species Act, for all practical purposes puts all of the responsibility on you, gives no incentives to you as a private landowner to deal with the potential problem, and frankly the government has taken little or no responsibility for helping you deal with it constructively. Is that pretty much the testimony?

Mr. PULLIG. I would agree with that, yes.

Mr. MATHERNE. There is no incentive to the shrimper.

Congressman Longley, you asked if we knew of any documentation of any amount of Kemp's ridley turtles—was that your question?

Mr. LONGLEY. Correct.

Mr. MATHERNE. There was, in 1947—and this is data from NMFS, I do not know how many Kemp's ridley turtles they had on

the beach in Mexico where the turtle normally lives. They keep going back to that, there are so many turtles that day they had on film, I know that, I am aware of that. And from 1947 all the way up to 1990, there was never no protection for that turtle.

Mr. LONGLEY. So for all we know——

Mr. MATHERNE. Even up to 1990, Mexico had a take of 25,000 turtles, direct harvest of 25,000 turtles a year and they are still taking turtles in the Caribbean today.

Mr. LONGLEY. And the others would agree with the conclusion? I do not mean to put words in your mouth, but we have very little time.

Mr. BOURLAND. I think if you could reauthorize the Act with regard to private landowners, if we had the situation of market incentives and private property rights as major policy emphasis, I think we would have less of a problem across the board with endangered species.

Mr. LONGLEY. Thank you, Mr. Chairman.

Mr. POMBO. Thank you.

I would like to thank the panel. There may be other questions that members of the task force would like to submit to each of you in writing, and I would appreciate an answer in writing for the permanent record of the task force. I would like to thank you very much for coming here to testify, taking time out from your busy schedules and participating in this. Thank you very much.

[Applause.]

Mr. POMBO. Mr. Doolittle will introduce the second panel if they would like to come forward.

Mr. DOOLITTLE. [Presiding.] Let me urge the witnesses on the second panel to come forward and we are going to continue rolling on through in order to hear from everybody.

[Pause.]

Mr. DOOLITTLE. Ladies and gentlemen, if you would take your seats and allow us to proceed, we would be most appreciative. The witnesses will not be able to be heard in the present atmosphere.

[Pause.]

Mr. DOOLITTLE. I would like to introduce the second panel dealing with wetlands issues today. Mr. Robert Spiller is a private landowner from New Iberia. His family has owned land in the area for over 100 years. Mr. Spiller has been trying to find an economic use for his land for several years and is here to tell us about his experiences with wetland regulation.

Our second witness, Mr. Frank Frederic is with the Ascension Parish Public Works Department. In Louisiana, flood control is a major public function both of the Federal Government, state government and local governments. Ascension Parish has been trying for years to implement its local flood control plan and has been having difficulty getting the necessary permits from the Corps of Engineers.

Our third witness, Mr. Leighton Steward is CEO of Louisiana Land and Exploration Company and Chairman of the National Wetlands Coalition. Louisiana Land and Exploration Company is an independent oil and gas producer headquartered in New Orleans. They also own more wetlands than any other landowner in the

state of Louisiana. They have been the recipients of a number of environmental and conservation awards.

Gentlemen, we welcome you here, we appreciate your efforts to prepare for and attend this hearing. And Mr. Spiller, we will begin with you. We will operate under the same rules as before, requesting each of you to keep your remarks within five minutes. Your full statement will be submitted for the record.

**STATEMENT OF ROBERT SPILLER, PRIVATE LANDOWNER,
NEW IBERIA, LOUISIANA**

Mr. SPILLER. Thank you very much, Mr. Chairman. I would like to give you a brief history of my wetlands problems. This is sort of a chronology.

It was sometime in the mid 1970's when I first had the idea to put a crawfish pond on my family's estate at Lake Fausse Point. This was formalized on April 3, 1978 when the Louisiana Forestry Commission inspected our 160-acre tract and drew up a plan to manage the property for both crawfish and timber production. I chose this site because of its size and its accessibility.

The next step occurred in June, 1985, when I entered into a lease with the West Bayside Corporation and got easement to the E.B. Spiller estate. The cost of the agreement was \$500 per year for a term of eight years, plus \$8000 in legal fees. An additional \$4000 was spent on repairs to a bridge over Tete Bayou.

Finally in September, 1990, I started construction on my crawfish pond. It took about three months and \$32,800 to construct an 80-acre impoundment for crawfish and timber production.

Shortly after completion of this phase of the project, all hell broke loose. The Louisiana Department of Wildlife and Fisheries informed me that the Corps of Engineers and the EPA wanted to talk to me about violations the Clean Water Act. It seems that I had used dredge material to create an impoundment on my own property and was guilty of pollution.

After conferring with my lawyer and Billy Tauzin's office and other public officials, it was determined that I should apply for an after-the-fact 404 permit. What a mistake. After \$7000-plus in legal fees and more than a year of extreme anxiety, the Corps denied my permit application on June 19, 1992. It seems that I could not prove to the Corps of Engineers with clear and convincing evidence that there was "no less environmentally damaging alternative site available to me". Nobody can prove that, that is an impossibility. What can I do now? Make another attempt at an after-the-fact permit? Not at a cost of \$7000 per attempt, or more. Besides, my lawyer quite as soon as I ran out of money.

Lately, I have tried to follow up on the timber aspect of this project. I received information from the Louisiana Forestry Association that leads me to believe that I am exempt from the need for a 404 permit on the grounds of an ongoing silviculture operation. That is forestry. That is according to Section 404(f)(1)(A-F) of the Clean Water Act.

On April 12, 1993, I drafted a letter to Ralph Corley, the then Regional Counsel of the EPA in Dallas, Texas, asking him if I qualified for an exemption. I included in the letter my grandfather's Act of Incorporation putting him in the lumber business on

October 23, 1913; two approved forest management plans, one from April, 1978 and the other from March, 1993; and a letter to Billy Tauzin from the EPA telling him that it would be all right for me to continue my timber operation.

To this date, Ralph Corley and the EPA have not answered this letter. Mr. Tauzin's office tried to find out why Ralph Corley had not answered my registered letter—I do have a copy of the domestic return receipt. Mr. Corley stated that he had not received any letter from me.

More recently, I had a meeting at Lake Fausse Point with John Sheehan with the Department of Justice and Tom Nystrom with the EPA. The purpose of this meeting was to iron out a deal between myself and the EPA. My docket is up at the Department of Justice—I think this is bad. I might be arrested or fined, or both, I do not know. The EPA informed me at this meeting that Ralph Corley was not big on paperwork—I guess that is why he did not answer the letter—and that he had recently retired from the agency to sell beach umbrellas. John Sheehan informed me that Tom Nystrom would answer my April letter within two weeks. It has now been more than a month and I still have no word about my exemption; that is, in writing. But Mr. Sheehan has informed me by phone that the EPA will be late with their answer, but that I would not be getting what I want. It does not look good for my project. To date, I have spent \$55,800-plus on this project.

Please help me get back my private property rights. I thank this Committee very much for the opportunity to present my side of this story.

Mr. DOOLITTLE. Thank you very much. Mr. Frederic.

STATEMENT OF FRANK FREDERIC, PUBLIC WORKS DIRECTOR, ASCENSION PARISH, LOUISIANA

Mr. FREDERIC. Thank you, Mr. Chairman and members of the Committee. I am just going to give you one of our main problems within Ascension Parish. We are the second fastest growing parish in Louisiana at the present time.

In 1980, the city of Gonzales commissioned a drainage study for an area which comprises approximately 20 square miles in Ascension Parish. Repeated flooding of homes in the affected area is caused primarily by backwater flooding of the Amite River and tributaries within the Parish which discharge to the Amite River. There are 2500 existing homes located in the special flood hazard areas in the rural portion of the Parish and 1000 in the city of Gonzales.

In 1983, after years of study, analysis and negotiation with the Corps of Engineers, EPA and other congressional agencies, Ascension Parish was granted a permit to construct a levee around the southeast portion of the Parish to protect that area from Amite River backwater flooding.

During the years 1983 through 1993, Ascension Parish proceeded to construct levees, improve existing canals and construct a \$10 million drainage pumping station. This work was done in house with Parish employees and equipment, and fully funded by the Ascension Parish taxpayers.

Apparently at no time did the Corps of Engineers monitor or visit the site during the construction. Considering the magnitude of such a project and the sensitive nature of these wetland areas, we question why no periodic inspections were performed by the Corps.

In late 1993, 10 years into the construction of the project, the Corps suspended work on the project and revoked the permit due to the fact that some of the work was not done in accordance with the permit and therefore considered unauthorized and a violation.

The Parish has been attempting to obtain a permit to continue work on the project for the past 14 months. The project which we are attempting to repermit is absolutely identical to the project which was permitted in 1983 by the Corps. Now the very same agency is insisting on seemingly endless documentation prior to re-issuing the permit.

The impacts associated with this delay in repermitting this project has far reaching effects:

Thousands of residents at risk of flooding will be subject to an additional one and a half years without flood protection.

Several pieces of heavy construction equipment are rusting away in inaccessible areas as a result of the suspension of work.

Several equipment operators have either been laid off or placed in temporary positions pending reissuance of the permit.

The hours, days, weeks and months of attention given by the Parish in an effort to repermit this project has distracted from its efforts on other important matters such as road improvements, water systems, sewer systems, zoning needs, et cetera.

For outside engineering and consulting fees associated with repermitting this project, the Parish has spent over \$25,000 to provide documentation for a project which has already passed Corps' scrutiny once before.

The project is entirely funded by the residents of Ascension Parish. The Corps have not contributed any funding to this project—not for study, not for analysis, and not for construction. The only efforts by the Corps have been to ensure that their files are sufficiently padded to protect them against lawsuits from the various environmental watch dogs. We believe that this bureaucratic process of properly documenting/justifying this project for the second time is an unnecessary burden on Ascension Parish.

There are no guidelines for providing the necessary documentation. The only guidance we get are requests like "evaluate appropriate and practicable alternatives available which would avoid or minimize adverse impacts and then evaluate appropriate and practicable compensation mitigation for all unavoidable impacts that remain after all appropriate and practicable minimization has been required." The average man cannot interpret the intent of such bureaucratic shop talk, and therefore, these kinds of requests place the applicant in a position of providing information until the Corps says "enough".

Each submittal of information is reviewed by the Corps and within one to three months, a response is received, generally requesting additional information. The requests for additional information are at times vague and often lead and to another request for additional information. This seemingly endless iterative process is extremely

frustrating, costly and, we believe, unnecessary. We believe that the Corps should take a more active role to assist the applicants on these larger, more complicated projects, as only the Corps knows that the Corps will accept.

The Corps have very competent, qualified and conscientious employees who are challenged with interpreting and then administering a law which, in concept, is good but in practice is awkward, inflexible, expensive and subject to individual interpretation.

Thank you, gentlemen.

Mr. DOOLITTLE. Thank you, sir. Mr. Steward.

STATEMENT OF LEIGHTON STEWARD, LOUISIANA LAND AND EXPLORATION COMPANY AND THE NATIONAL WETLANDS COALITION

Mr. STEWARD. Thank you, Chairmen Pombo and Doolittle and members of the task forces, for the opportunity to appear today to discuss the wetlands issue. My name is Leighton Steward and I am Chairman and CEO of The Louisiana Land & Exploration Company. We own over 600,000 acres of land in Louisiana, which is primarily coastal wetlands. I also serve as Chairman of The National Wetlands Coalition and am an earth scientist by formal education. This has afforded me the opportunity to personally visit wetlands from Louisiana to Arizona, California, Wyoming, Virginia and even the north slope of Alaska. I agree with some of your own observations that all wetlands are not alike.

The National Wetlands Coalition is a group of approximately 70 organizations, including Native American groups, diverse local and national associations, local governments and public and private companies. We represent a cross section of the community subject to regulation by the Section 404 permitting program. Our major areas of concern with Section 404 and recommended changes to correct these deficiencies are summarized in my written testimony.

This morning, I would like to focus on one major point—the “no net loss” of wetlands goal. But first, I would like to briefly mention the serious Louisiana coastal erosion problem. Louisiana has 40 percent of the nation’s coastal wetlands, but is experiencing 80 percent of the wetlands loss, up to 35 square miles a year. Nearly all of this is due to natural processes like sediment starvation and natural compaction. This is a problem that cannot be resolved by any wetlands regulatory program. Thus, I believe it is beyond the scope of this hearing. It is a major problem that will require mega billions of dollars to correct. I am sure you will hear more about it from the Louisiana delegation and state officials.

To acquaint you with the situation, I have provided you with a booklet called “Louisiana’s National Treasure.” This book was prepared about seven years ago and we have over 50,000 copies of the book out. And in all of those years since its publication, no one or no group has challenged the basic facts in this booklet. So I would urge you to spend 10 minutes reading it, and it will tell you why we are losing all this land.

Now to address “no net loss”. The Coalition, since its inception, has recognized the importance of all our nation’s remaining wetlands. We have supported the goal of no overall net loss of wetlands when expressed in terms of functions and values. In fact, we

believe that the Nation is close to achieving no net loss, even in terms of net acres. If we are not already there, this is certainly in sharp contrast to the continuing purported annual loss of 290,000 acres of loss generally reported by the environmental extremists and even by many of the administration officials. I understand that Congressman Sherwood Boehlert, Chairman of the Water Resources Subcommittee of the House Transportation and Infrastructure Committee, used this erroneous figure at his Subcommittee's March 7 wetland hearing.

The 290,000 acre number is from a U.S. Fish and Wildlife Service survey covering the 1974 to 1983 decade. That is now 12 years old. Since then, agricultural conversion of wetlands have declined dramatically. Significant conversions back to wetlands are being achieved through other Department of Agriculture programs such as the Conservation Reserve Program and the Wetlands Reserve Program. Other restorations are being accomplished through the U.S. Fish and Wildlife Partners for Wildlife and North American Water Fowl Management Plans. Also, mitigation required under Section 404 is adding to the wetlands base, as are many private endeavors.

For example, over the last 10 years, Ducks Unlimited has developed, enhanced and restored over 500,000 acres of wetlands. No net loss, not only can and should be achieved, but probably already is being achieved.

Now last June, I presented the attached table that is on the back of my speech there, that suggests that the Nation may already be in this "no net loss" mode, and is actually gaining wetlands, 44,000 acres in 1993. A more recent report by the Competitive Enterprise Institute, suggests that the net gain of wetlands in 1994 was 60,000 acres. Some people will take exception to these numbers, and that is OK. It is the dramatic reduction in wetlands losses that is important and is based on government data, not Coalition or other industry projections.

The administration, Congress and others should promote this good news and not continue to use the old out-of-date negative information. I am not saying we can sit back and relax, but this indicates what can be done when mitigation is coupled with reasonable development and practical remediation programs.

The members of the Coalition encourage you to proceed with development of a national wetlands program that will further the goal of no overall net loss of wetlands function and values, while earning the support and cooperation of the regulated community. We believe this can be achieved through Title VIII of H.R. 961, the Comprehensive Wetlands Conservation and Management Act.

Thank you.

[The statement of Mr. Steward may be found at end of hearing.]

Mr. DOOLITTLE. Thank you.

Mr. Steward, would you contrast what you mean by no net loss in terms of acreage versus no net loss in terms of functions and values?

Mr. STEWARD. Yes, sir. If it is no net loss of acre per acre, that means that if you had a project and you destroyed, altered, molested, whatever, five acres of land, you would have to have a mitigation project that would offset that for five acres. If you are down

here in this three and a half million acres of Louisiana delta where essentially everything is 100 percent wetlands, the kind of advances that can be done down here would be to take, say 100 acres that has had salt water intrusion into an otherwise freshwater marsh, and on a scale of one to ten, it is no longer a pristine scale ten marsh, but maybe it has deteriorated to a three on that scale. Well, if we go back in and spend some money and divert some freshwater back into that area, we might move it from a three back up to a seven or an eight. You have increased the value of that wetland. And the deterioration might have been caused by man or it might have been caused by Mother Nature. But nonetheless, the mitigation would increase the value of that land for the wildlife and the fish and everything else that may use it as part of their life cycle.

Mr. DOOLITTLE. OK. So you could raise the level of quality of the wetland rather than having to just find or create five acres someplace else.

Mr. STEWARD. Correct. In other parts of the country, you are able to physically go out and replace that five acres with another five acres converted back into wetlands. For instance, of the hundred million acres that this country has lost of its wetlands since Columbus discovered America, 87 percent of the loss has been caused by agricultural activities. I do not think anybody is knocking that and those are government figures, not our figures. But a lot of today's youth is not sitting at home any more back on the farm, they have all moved to the city. And there are millions and millions of acres that are lying fallow, that may have just simply been contoured a little bit with a tractor to keep the water off of that property. I know that from personal experience because my father raised some corn and stuff in behind our house. All that would have to be done is to recontour that property and let the water back on it and it is wetlands again. There are vast amounts of the United States that could be reconverted to wetlands.

Mr. DOOLITTLE. When you used the figure, I think you cited the Competitive Enterprise Institute figures, saying there had been, was it for 1993, an increase, a net increase of 60,000 acres of wetlands? Was that using the acreage approach or the functions and values?

Mr. STEWARD. No, this is actually just an acreage approach.

Mr. DOOLITTLE. Just acreage, OK.

Mr. STEWARD. And the numbers that I have given you are the ones we are most familiar with, and these numbers come from the Corps of Engineers, the Soil Conservation Service, the NOAA and the U.S. Fish and Wildlife Service. And when you net out all of these gains and losses, that is where we came up with the 44,000 acres. And these are numbers that were requested by people from the Honorable Blanche Lambert to Senator Bennett Johnson and even some of our own requests to people. But they are numbers that we got back from the government agencies themselves.

Mr. DOOLITTLE. Thank you.

Mr. Frederic, have you quantified how much the permitting requirement has added to the total cost of your flood control project?

Mr. FREDERIC. Well, first of all, we have lost about 14 months by not having our permit. As you know, 14 months ago, costs were

not as high as they are today. So everything is increasing. We have not documented exactly what it would cost us, but we know it is a lot more costly. And another thing is that one of the permits was on the levee itself. Well, at one time, we were digging dirt and using that dirt for the levee. And of course in one section of it that we have been permitted to complete the little section of the levee, we are hauling all the dirt in for that one. So that is a much larger increase than what we have had in the past.

Mr. DOOLITTLE. Are you being ordered to do any restoration of areas that you have already worked on? And if so, could you describe what you are being ordered to do and by whom?

Mr. FREDERIC. Yes, we have had discussions with the EPA and the Corps about mitigation, and of course, we have not resolved those things yet. But we do have some of those discussions going on.

Mr. DOOLITTLE. So by mitigation you mean—

Mr. FREDERIC. Well, we have talked about—we have done some mitigation, by the way, on the original documentation. The original 1984 permit, or 1983, specified that you just had to do replanting and putting duck boxes and stuff like that along the canals where we dug. And those things have been done.

The new mitigation, of course we have to get into a permitting position before we can start mitigation discussions. And of course, that is where we are now. And of course, we would like for them to say hey, we are going to give you this permit and let us discuss mitigation, what is it going to be. And we have even taken a look at 1000 acres in Ascension Parish that are existing wetlands that we could purchase, the Parish could purchase, and use those wetlands for mitigating purposes. So we are going that route and we have prices on those things and we know what the cost is.

Mr. DOOLITTLE. Thank you. Unfortunately my time is up. The Chair will recognize the gentleman from Minnesota, Mr. Vento.

Mr. VENTO. Thanks, Mr. Chairman.

Mr. Frederic and Mr. Spiller both are seeking—you had permits, Mr. Frederic, Mr. Spiller had no permit for what he did, it is my understanding. That is correct, you had a permit but you exceeded your permit, this is a 10-year long project that you are doing in Ascension County, in your Parish, pardon me.

Mr. FREDERIC. Yes, we had a permit.

Mr. VENTO. But you exceeded the terms of the permit.

Mr. FREDERIC. Sir?

Mr. VENTO. You exceeded the terms, you were outside the permit.

Mr. FREDERIC. Evidently we were in some areas.

Mr. VENTO. And your concern is that the—I mean, one of the statements you make is that the Corps of Engineers did not pay close enough attention to what you were doing. Did you consult them during that period to determine whether the actions were appropriate or within the permit?

Mr. FREDERIC. Of course, I was not there at the time, I have just been in this job about 14 months.

Mr. VENTO. Oh, so you actually—

Mr. FREDERIC. But the problem is that—we do have the documentation that they say—one of the things that they claim is a

problem is our pumping station and the side, that is the boat opening, you know, for boats to pass through.

Mr. VENTO. Yes.

Mr. FREDERIC. And of course, during the construction, why was this not noted during the construction, until after it was done and now you have a \$10 million facility.

Mr. VENTO. Well, did they approve the size of that docking facility during the construction? I mean, whose responsibility is it to in fact get the permit in terms of what they are approving? Have you cleared areas next to the canals?

Mr. FREDERIC. Say that again.

Mr. VENTO. Have you cleared areas next to the canal?

Mr. FREDERIC. Have we cleared extra areas?

Mr. VENTO. Yeah.

Mr. FREDERIC. Yes, evidently that was some of the problems. They assume—and I guess it was documented—that we went, the Parish cleared extra places that they should not have cleared. And that is some violation.

Mr. VENTO. Has your project been subject to any lawsuits other than enforcement actions? Has your project been subject to lawsuits or other enforcement actions by the Corps or the EPA? Have they taken any court action?

Mr. FREDERIC. No, we have not had any—

Mr. VENTO. So they are trying to work it out with you, is that correct?

Mr. FREDERIC. That is right.

Mr. VENTO. Well, I think it is appropriate that they do so. You know, I think all of us regret to see when problems or misunderstandings arise, but I do not know that—I am not trying to point any fingers here, but I do not think it necessarily is their fault. You are just saying it is a tough issue.

Mr. FREDERIC. We readily admit some of these violations were made before 1990, and we have been trying to work them out. But the problem is we do not think it should take 14 months to work them out. And we are ready to work them out.

Mr. VENTO. Yeah. Mr. Spiller, did you comply with the Corps' cease and desist order with regards to EPA administrative compliance? They asked you to breach that, you had a 7000 foot long backfill that you took out?

Mr. SPILLER. Yes, sir, I put gaps, I put five gaps at different points on the levee.

Mr. VENTO. You did that after-the-fact though, is that correct?

Mr. SPILLER. Yes, sir.

Mr. VENTO. Because that was stopping water. You are right next to a lake. You know—

Mr. SPILLER. I am 200 feet from Lake Fausse Point.

Mr. VENTO. Yeah, you are right by the lake. Have you completed any construction toward the forestry aspect, later after this, you went after-the-fact to get the permit.

Mr. SPILLER. Yes. I do not have an after-the-fact permit.

Mr. VENTO. You do not have an after-the-fact permit.

Mr. SPILLER. I was denied the after-the-fact permit.

Mr. VENTO. You were denied that. You were denied the after-the-fact permit, but you also changed the application. You are now

claiming that you were also using that for forestry purposes, is that correct?

Mr. SPILLER. Yes, sir, I am not claiming this after the fact. I have the 1978 forest management plan from the Louisiana Forestry Commission proving that I did have the intention all the time of also doing forestry other than crawfish.

Mr. VENTO. Well, did the construction of that road create an impoundment in the same area as the crawfish pond?

Mr. SPILLER. Did the forestry management plan say that?

Mr. VENTO. No, did the forestry road construction.

Mr. SPILLER. It coincides with impoundment.

Mr. VENTO. So it also created an impoundment.

Mr. SPILLER. The road is used for the forestry.

Mr. VENTO. Have you harvested any timber?

Mr. SPILLER. Yes, sir, I have, approximately 30-35 acres.

Mr. VENTO. Uh-huh. The issue, of course, is that there have been written statements submitted to the record by individuals that are opposed to this particular project.

Mr. SPILLER. Yes, sir. I believe most of them are from a group called WOW, it's War on Waste, it's a local environmental group in New Iberia.

Mr. VENTO. Mr. Steward, the administration recently came out with three different initiatives just last week, the homeowner general permit for up to half acre for home construction and so forth, and farm buildings, two acres, and guidance on use of wetlands mitigation banks. Previously, of course, they had exempted all existing use land in 1993. Do you favor these three new initiatives? Does the National Wetlands Coalition have a position with regard to these three types of exemptions?

Mr. STEWARD. Well relative to the first two, I do agree with some of those exemptions, but I will have to tell you that I would hope that anybody that actually disturbs a valuable wetland might have to pay some mitigation fee that could then go into an offset for a much larger mitigation. The problem with the mitigation program in the United States over the last many years, and this has even been agreed to by the EPA when you go and talk to the administrators, the last couple of administrators, is that where people have done these small projects of one acre or things like that, and then they have done a one acre mitigation, these little postage stamp or bandaid mitigations have not worked. And most of those things over the last several years have ended up just being neglected.

So I would like to say that relative to mitigation, I think anybody that is going to develop a wetland should be probably charged some very modest fee that could then go into some bank to reclaim 5000 acres of wetlands, where you do it collectively, and maybe that money comes from corporations that develop a parking lot, a mall or something like that, all the way down to somebody that wants to go out and put a home in a wetland.

Mr. VENTO. My time has expired. Thank you.

Mr. DOOLITTLE. The Chair recognizes the gentleman from California, Mr. Pombo.

Mr. POMBO. Thank you.

Mr. Spiller, were you ever given a chance to file for any kind of appeal with the agency that denied your permit?

Mr. SPILLER. No, sir.

Mr. POMBO. In the instance of what we term private property rights, if the Federal Government were to build a highway across your property, you would expect to be compensated for that.

Mr. SPILLER. That is correct.

Mr. POMBO. But because your property is wetlands and you are being denied the use of your property—any use of your property—under the current process that we go through, the chances of you being compensated for that are slim.

Mr. SPILLER. That is correct. I would probably have to go to the Supreme Court.

Mr. POMBO. Do you have the—I guess this is a personal question, but I know from my own personal experience, the financial wherewithal to take a case to the Supreme Court is extremely difficult to do, and I am sure that in your case, that would be an extremely difficult situation.

Mr. SPILLER. That is right. If I had known that this was going to happen back in 1990, I probably would have gone for a law degree.

Mr. POMBO. Mr. Frederic, is the Parish being required to undertake mitigation in order to get this permit approved?

Mr. FREDERIC. At the present time, that does not seem to be the issue. It seems that they just keep putting stumbling blocks in our way. They will tell us OK, we need some hydraulic information and then we bring them that and then they say well, we will need something else. And they say well, you are only two weeks off, we think we are going to permit you in two weeks. And that was before Christmas.

Mr. POMBO. Have they talked to you about mitigation?

Mr. FREDERIC. They have discussed mitigation with us, and we have no problem with that. I do not think that is the issue right now.

Mr. POMBO. What types of mitigation have they talked about?

Mr. FREDERIC. Well, on this particular project, we have some mitigation—of course we have some other types, but this one they talked about mitigation of either buying some land banks from someone else, getting our own within the Parish, and that is the only thing. That is why we have investigated property owners and we have got some timber companies and that sort of thing that have come up with some property that we can purchase. But this does not seem to be the reason that they have not permitted the project.

Mr. POMBO. There have been other stumbling blocks that have been put in the way.

Mr. STEWARD, over the past several years, many in Washington have criticized the idea of takings legislation and compensating landowners for the loss of value of their property. And one of the major reasons is because they claim that people who own wetlands would receive a large financial windfall from being compensated for their losses. How would you respond to those criticisms?

Mr. STEWARD. Well, I think they just have not looked hard enough to see what kind of rules and regulatory checks need to be put in there to make sure the windfalls do not occur, because on the other side of the issue, I think the fact that you can go in and

take somebody's private property rights by coming in with a regulation that does not let them do something that they were clearly entitled to do by law at the time they purchased that property, I think that is a much worse transgression. And I think we just need to work on tweaking the system up so that those windfalls will not occur. I do recognize that potential, but when I look at somebody like one of the people on my own board of directors that spent his whole life working for the United States Navy and bought a little piece of property on the east coast and comes back and retires out of the Navy and finds out that he cannot go use that property like he thought he could and that he spent a lot of money on all those years he was serving the United States government, something is wrong there if he does not get compensated for the fact that he cannot go have a retirement place on that acreage.

Mr. POMBO. So it is your estimation that if compensation were a part of it, that the Federal agencies would work a little bit harder to find solutions other than operating in a very heavy handed manner.

Mr. STEWARD. I think that is true. And I think there is such a tremendous practical potential for mitigation that can offset that, that I think where the mitigation thing can be kicked into the formula, it is going to allow some of this development to occur. There obviously are pristine places in the United States of America that should not be developed and there are probably some in this part of the country. But as some of you have already said, there are wetlands and there are wetlands and there are wetlands. And a one acre prairie pothole needs a different regulation than three and a half million acres down here of solid wetlands, that obviously you are not going to destroy the whole system by going out and, you know, developing a boat launch or something here or there—it is just going to have no impact on the system.

Mr. POMBO. Thank you.

Mr. DOOLITTLE. The Chair recognizes the gentleman from Louisiana, Mr. Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman.

Gentlemen, let me focus on one point that is in common with all of your testimony. Mr. Spiller, Mr. Frederic, Mr. Steward, you all pointed to one enormous and glaring problem with the Wetlands Act, and that is the inability to get information, inability to know whether or not you can or cannot use your property and under what limits you can use it or what limits the government is going to impose restrictions.

Mr. Spiller, you wrote a letter on April 12, 1993——

Mr. SPILLER. That is correct.

Mr. TAUZIN [continuing]. that is almost two years ago.

Mr. SPILLER. That is right.

Mr. TAUZIN. You wrote a letter and you drafted it to Mr. Ralph Corley, Regional Counsel for the EPA, you sent it registered.

Mr. SPILLER. Yes, sir.

Mr. TAUZIN. And all you did in that letter was to ask him whether or not you were entitled to the silviculture exemption that exists in the law, so that you might in fact use your property for timbering, as your timber plan called for. Have you got an answer to that letter?

Mr. SPILLER. Not yet, I am still waiting.

Mr. TAUZIN. Two years?

Mr. SPILLER. Yes.

Mr. TAUZIN. Mr. Frederic, you conducted a project, or your Parish did, for 10 years under a Corps permit. Your testimony says that at no time did the Corps of Engineers monitor or visit the site during the construction. For 10 years, there was no monitoring, no visits to the site, to see whether or not you were living within the permit according to their interpretation?

Mr. FREDERIC. I assume that, since they waited until that long before they came down and said something was wrong.

And I would like to state this, that the Parish did this with their own funds, they got no outside help.

Mr. TAUZIN. I saw that.

Mr. FREDERIC. And they were doing it on a pay-as-you-go basis. And of course, they told us that they would stop it—they would have stopped it whether we had violations or not, that it would have stopped because we ran out of time.

Mr. TAUZIN. Under the time of the permit.

Mr. FREDERIC. Under the time element. And this is a situation that we acknowledge, but what we would like to see is that it is re-permitted and we can continue and finish that project.

Mr. TAUZIN. Yeah. And you literally are doing something the Corps normally does—

Mr. FREDERIC. That is right.

Mr. TAUZIN [continuing]. in terms of flood protection. You are doing it with Parish money and if you succeed in doing it, you are going to reduce the flood potential damage to homes in the area, which I assume helps FEMA the next time we have a storm or hurricane or something, reduce losses because of flooding. You are doing this with Parish money. They shut you down late 1993 because they finally decided you were doing something they did not like. And all this time now, as I understand it from your testimony, every time they submit a request for information to you, it takes a month or three months for them to respond to your submittal. Is that right?

Mr. FREDERIC. That is right. It seems that when we submit something, they take a good while to submit it back and they ask for additional information.

Mr. TAUZIN. They usually ask for more information.

Mr. FREDERIC. That is right.

Mr. TAUZIN. So this process goes on and on and on and in the meantime, the project is shut down.

Mr. FREDERIC. That is right.

Mr. TAUZIN. And the flood situation is still an imminent problem for homeowners in the area.

Mr. FREDERIC. Right.

Mr. TAUZIN. Mr. Steward, you point out in your testimony that there is no administrative appeals process for landowners who believe their property may not be indeed a wetland, jurisdictional wetland. The only way you can find out is to file for a permit, even though you do not want one.

Mr. STEWARD. Correct.

Mr. TAUZIN. And then you have to be denied and then you get a chance to go to court and appeal the decision.

Let me ask you something that I think we all deserve an answer to. Do you agree with me that when a person sells property to another person in America, that if there is a wetlands problem on that land, that number one, he ought to know it, he ought to be able to get a clear answer as to whether or not that is a problem; and two, that he ought to inform his buyer that there is a problem?

Mr. STEWARD. Well, sure he should. And the only way he is going to know it is for some kind of national survey to be done and some kind of maps to be posted, because right now the average person has a very difficult time figuring out what is and is not a wetland unless he lives south of interstate 10 here and then he knows.

Mr. TAUZIN. Well, the government keeps changing its definition of wetlands and manuals keep coming out. How is a landowner in America going to find out whether or not property he wants to borrow money on and build a home on or purchase for his family is a wetland today. How is one landowner going to warn the next landowner before he sells him that property that there is a problem on it, if there is no way of finding out without going through this incredible process where you have got to file for a permit you may not want, get denied and then go to court?

Mr. STEWARD. Right. There is no way that I know of right now that he could do it other than to go hire somebody to come out there and get it done.

Mr. TAUZIN. So in summary—my time is up—we have got a situation, Mr. Spiller, where not only were you not told you needed a permit when you started your crawfish farm; after you got it going, you were told to take it down, you could not get an after-the-fact permit and now for two years, they will not even answer a simple letter as to whether or not you can conduct silviculture operations under the exemption of the law.

Mr. Frederic, you tell us for 14 months, you cannot even get it straight from the Corps as to what they require you to do in order to move forward with the flood protection project.

And Mr. Steward, you say that if we do not change the law some kind of way so that we know what are rights are on our property so we can inform buyers of the risks they are taking, we have got a mess on our hands and people are flying lawsuits at each other unnecessarily in America.

Mr. STEWARD. That is right, and some of us corporations can afford to go to court, but I do not know how the average Mr. and Mrs. American fights this whole system in court.

Mr. TAUZIN. Well Mr. Spiller's lawyer apparently found out that if Mr. Spiller could not pay him any more, he was not going to work for him and so he has lost his chance at justice in America. And that literally is what we are talking about.

Thank you, Mr. Chairman, for the time.

Mr. DOOLITTLE. Thank you. The Chair recognizes the gentleman from Oregon, Mr. Cooley.

Mr. COOLEY. Mr. Spiller, I need a little clarification here. When you had your formal request in to the Louisiana Forest Commission and they inspected your property in 1978, in that inspection did it note that you were going to build a crawfish farm or pond?

Mr. SPILLER. Yes, that is correct. I have a copy of all of those management plans with me.

Mr. COOLEY. All right.

Mr. SPILLER. It was for both crawfish and timber management but the highest priority was timber.

Mr. COOLEY. Do you know if that in Louisiana the Forest Commission corresponds or has any connection at all with the Louisiana Wildlife and Fishery information? I mean, do they talk to each other at all, do they cross information? When the Forest Service comes out and does an inspection and gives you a plan and works it all out, do they provide that information to anybody else or is this kept—

Mr. SPILLER. Yes, sir, it was a team that came out on the property the second management plan.

Mr. COOLEY. So we can assume that the Louisiana Department of Wildlife and Fisheries was also aware of your project.

Mr. SPILLER. I am not sure in 1978 if they were or not. It was the Louisiana Forestry Commission only that came out for that inspection. The later inspection was with the Wildlife and Fisheries and Forestry Service and my own personal forestry consultant.

Mr. COOLEY. So maybe we can assume that one department is not talking to another department, so you are never sure of anything until you go through the departments.

Mr. SPILLER. In 1978, it was with the Louisiana Office of Forestry and that was under the Department of Agriculture, I believe.

Mr. COOLEY. OK. Could you tell me about the lease that you entered into with West Bayside Corporation? What was that about?

Mr. SPILLER. My land, like a lot of other land in the area, is landlocked. Back in the early 1900's when they harvested the timber, they did not need land easement because they floated the logs out in the Atchafalaya Basin system. And since we built the levees on the Atchafalaya Basin, that no longer can happen.

Mr. COOLEY. When the EPA people talked to you and they said that Mr. Ralph Corley was not big on paperwork, did they do that verbally or in writing? I am just kind of curious.

Mr. SPILLER. This is all verbal. You can learn a lot of things from these people verbally and they will not write it down.

Mr. COOLEY. I suggest the next time they do that, you send them back a letter confirming that is what they tell you. I find that very hard to believe.

So you are right now sitting in limbo waiting for the Department of Justice to come and handcuff you and take you away for putting dirt on your own property.

Mr. SPILLER. I was assured by Mr. Shaheen that that probably would not happen. Now—verbally.

Mr. COOLEY. I hope so. Yeah, verbally, did that verbally.

Mr. Frederic, I want to say one thing to you, sir. It is very—I think you are very lucky that you are a local government entity, because I think if you were a private enterprise, you might be in deep trouble, serious trouble. I cannot understand why the—I brought up before, I cannot understand why in 10 years, the Corps of Engineers, which is really vitally concerned with what you were doing, never monitored or inspected you. It is almost inconceivable that you could be doing these kind of projects and the Corps not

coming out and even looking at the project. I just do not quite understand that.

Are you supposed, on your permitting process, to notify them when you do something so they will come out. Or is it assumed that they are going to come out and do the inspection while you are in your construction project? Or do you know?

Mr. FREDERIC. I do not know that. I would just like to say that on the main channels that we dug, it was very little areas that we went out of boundary, it was very minimal on the violations in that area. But I think the problem is that on the levee system, we cleared some areas that should have not been cleared. And of course, what the local governing authority did at the time, they tried to comply with the landowners and at the same time get the right-of-ways and do what the landowners asked them to do to perform the duties and build a levee. And of course, that is when you get in problems. We still are concerned about the landowners because we have to contend with those people because you have to get right-of-ways from them.

Mr. COOLEY. In your conversations, do you have any indication when they are going to repermit you, or is this going to drag on for—

Mr. FREDERIC. We feel they are going to repermit us. It is just going to take awhile, it might be another six months.

Mr. COOLEY. Thank you.

Mr. FREDERIC. Because six months ago, they said it would be about a month or so.

Mr. COOLEY. And Mr. Steward, I think that H.R. 9 will give you some relief on your private property rights. As you know, we passed something in Congress recently. Hopefully that will clear the Senate and possibly the chief executive officer will sign this which will put some more rights back to the Constitution, to the private property owners in the taking issue, which will help some of these problems I think that we face today, not only in Louisiana but also in the western part of the United States.

Mr. STEWARD. Yes, sir. We are just looking for some common sense in the regulations, that is all we are looking for.

Mr. COOLEY. Thank you very much, Mr. Chairman.

Mr. DOOLITTLE. The Chair recognizes the lady from Idaho, Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. Spiller, I am so sorry about what your attorney did to you. Did you know that in the attorney's code of ethics, that they are not really allowed to drop you because you cannot pay their bills, once you are in the middle of a case?

Mr. SPILLER. Well, I am not exactly in the middle of a case.

Mrs. CHENOWETH. Pardon me?

Mr. SPILLER. I am not exactly in the middle of a case.

Mrs. CHENOWETH. Were you when they dropped you?

Mr. SPILLER. I just was denied a permit.

Mrs. CHENOWETH. I see, OK.

Mr. SPILLER. It was not a court action at that time or a docket with the United States Department of Justice. That came after.

Mrs. CHENOWETH. Let me ask you, apparently—you testified "It seems that I could not prove to the Corps with clear and convincing evidence that there was no less environmentally damaging alter-

native sites available to me." Did they suggest another site? Could they prove to you that there was a better site?

Mr. SPILLER. The regulatory assumption is that there is a better site and the burden of proof is on the landowner to prove that there is not.

Mrs. CHENOWETH. But they did not tell you where the better site was?

Mr. SPILLER. No, that was not—they did not have the burden of that proof.

Mrs. CHENOWETH. And——

Mr. SPILLER. I had the burden of proof that there was not one. That is all, that is the only regulatory assumption that they made at that point.

Mrs. CHENOWETH. I want to know—Mr. Tauzin wanted me to ask why can you not grow crawfish there.

Mr. SPILLER. Why can I not? It is considered a crop. I would be taking the wetlands out of wetlands and turning it into a cropland. I can give you an example of this. My next door neighbors own 240 acres of crawfish ponds and they have never grown a crop in their crawfish pond and it is returning to woodlands, and I asked them what it was designated as, and it was designated as cropland, not wetlands, even though it is flooded for six to seven months out of the year with at least 18 inches of water. That is still considered crop land.

Mrs. CHENOWETH. Is that—in its natural state, is it a natural habitat for crawfish?

Mr. SPILLER. That is correct.

Mrs. CHENOWETH. So that was part of their decision too?

Mr. SPILLER. That decision about what? I do not understand.

Mrs. CHENOWETH. For denying the permit?

Mr. SPILLER. Yeah, I think so.

Mr. Radanovich.

Mrs. CHENOWETH. That is amazing.

You know, I want to follow up on Mr. Tauzin's line of questioning about the agency not responding to your registered letter, and you do have the signed return receipt.

Mr. SPILLER. Correct.

Mrs. CHENOWETH. What would happen if the Internal Revenue Service sent you a registered letter and asked you to appear in 10 days with your records—what would happen to you if you did not appear?

Mr. SPILLER. I would be in big trouble.

Mrs. CHENOWETH. Do you not think it is about time that the agencies live under the same set of laws that you and I have to, in terms of responsiveness?

Mr. SPILLER. Well, the Department of Justice told me a little over a month ago that their man with the EPA would answer the letter within two weeks, and that was going on five weeks.

Mrs. CHENOWETH. Good.

Mr. Frederic, I wanted to ask you, you have a responsibility and a duty to the citizens in the Parish to protect them from flooding, do you not?

Mr. FREDERIC. Yes, we feel we do. And we would like to complete our project because we have it in a certain stage that, you know,—

Chairman of the Committee, you know the rain that came from California, that is going to be in our area tonight or tomorrow, and we expect four to six inches of rain from that. So we are looking at maybe tonight sometime, at least closing those locks and pumping the water down to zero because the east wind has been blowing and it has got us up to two feet level right now. So we are going to try to close those gates and then pump the water down to at least zero so that we will have room for that water when it comes in.

Mrs. CHENOWETH. Well, let me tell you, my hat is off to you for doing the work and protecting the citizens as you are doing. It is not because of the Federal Government, it is in spite of the Federal Government that you continue on with your duty.

But if, because you failed to act, people's homes are flooded and they suffer economic damage, who would be liable?

Mr. FREDERIC. I think in this case, we would.

Mrs. CHENOWETH. That is right.

Mr. FREDERIC. We mentioned FEMA earlier, and we already have a certain amount of protection with what we had and if we would not have had that, we would have had hundreds of homes going under already at different times. So we are protecting them to a certain degree right now. Anyway, the project is not complete.

Mrs. CHENOWETH. Mr. Steward, I think your testimony is one of the finest pieces of testimony I have seen with regard to the problem of wetlands. You have incorporated the legal decisions that have brought the wetlands into even private ownership. And I commend you on the quality of this testimony.

You indicated that 75 million acres, of which a large percentage was in private ownership—did you realize, sir, that before the turn of the century, the Congress passed what they called the Swamp-land Grants, which allowed people to go out and with Congressional help, Federal help, break out 66 million acres that had alluvial soils and swampy in nature, and especially in the midwest, and put in tiles and drainage systems so that we could grow the agricultural goods that we do, and now this is a complete turn-about.

Mr. STEWARD. Yes. We are very aware of that because the land that our company owns, we bought the land from the state. We were encouraged to develop that land, we were encourage to put canals in it—

Mrs. CHENOWETH. That is right.

Mr. STEWARD [continuing]. over the years. And all of this has flip-flopped. So it is very unusual—I say unusual—it is very distressing to see something like this happen and see everything turned completely around and go so far to the other extreme. I think the pendulum is getting ready to swing back, and all we are urging this Congress to do is just to put some common sense, middle-of-the-road kind of regulations in there and we will all be happy to live with middle-of-the-road, common sense regulations.

Mrs. CHENOWETH. Thank you, sir. Thank you, Mr. Chairman.

Mr. DOOLITTLE. Thank you. The Chair recognizes the gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman. I have no questions at this time.

Mr. DOOLITTLE. I recognize the gentleman from Texas, Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman.

Mr. Steward, I come from the one acre prairie pothole wetland variety. But from an overall perspective, tell me your thoughts about common sense, middle-of-the-road type changes in the regulation that would make sense for my area and for yours.

Mr. STEWARD. Well, I think the main common sense thing that can be put into it is the mitigation, is relying on mitigation as the main remedy when a wetlands needs to be developed. And if somebody is going to do something because they cannot avoid a prairie pothole in your area, I guess I would suggest they need to figure out a way to go build another prairie pothole, if that is possible. But I think mitigation really does hold the key to being able to have continued development of some wetlands in the United States. And certainly that is going to occur whether any of us in this room want it to happen or not, because the population of the United States of America is increasing by leaps and bounds and all of those folks are not going to continue to just live in higher and higher and higher high rises. They are going to live someplace. And so we need to do something so that when some of those wetlands are developed, that we will replace them with some wetlands that maybe have been taken out of the system in years gone by.

Mr. THORNBERRY. Do you think we also need to take a look at the definitions, and as was pointed out a few minutes ago, that seems to be something that changes and do we not need to tighten that up?

Mr. STEWARD. Absolutely. We are proposing that wetlands be classified and broken down into pieces and definitions that make sense. There are certainly high value pristine wetlands in the Yosemite Valley, there are regular wetlands like you look at down here—although there are a lot of high value ones down here also—and then there are some things that with the current definition that has been put before us over the years, has said that if water comes within 18 inches of the surface, not to the surface, but within 18 inches of the surface for a period of X number of days during the year, it is a wetlands. It can be totally bone dry the rest of the year, but if there is a real heavy rain or a real heavy diversion of water into that area because of a flooding someplace or whatever, it is a wetland. Those things do not make any sense.

Mr. THORNBERRY. Yeah, I agree.

Mr. Spiller, let me ask you this: Did you ever investigate what would happen if you got tired of waiting on these people and just went ahead and did what you wanted to?

Mr. SPILLER. Well, I am more or less kind of doing that. I did do some of the silviculture, I did harvest 30 to 35 acres of trees recently on the property. And of course, I was told in a letter from the EPA to Billy Tauzin that that was OK.

Mr. THORNBERRY. OK.

Mr. SPILLER. Even though I was not allowed to do crawfish farming at the same time.

Mr. THORNBERRY. And that has been prohibited completely.

Mr. SPILLER. Yes.

Mr. THORNBERRY. Thank you, Mr. Chairman, I yield back.

Mr. DOOLITTLE. Thank you. The Chair will recognize the gentleman from Washington, Mr. Metcalf.

Mr. METCALF. Thank you, Mr. Chairman. In the interest of time, I will forego any questions.

Mr. DOOLITTLE. OK, thank you. Then we will move to Mr. Longley, the gentleman from Maine.

Mr. LONGLEY. Mr. Spiller, again, I do not know, Mr. Tauzin, whether the laws down in Louisiana are any different, but from what you are describing, a man accused of a crime would probably be in a better position legally than you have been. At least under our law there used to be a presumption of innocence, and even furthermore, there also would be an expectation that you would know the crime that you are being charged with. And the question that I have is that I have gone through your testimony, and from what I can see—and I have got a list here that I would just like to verify of the people and the entities that you have had to deal with, and I am assuming that a crawfish farm is not—would not necessarily be considered an extensive development, at least here in Louisiana. Would that be the case?

Mr. SPILLER. No, it is adding more water to a land that already had some water to start with, maybe six inches to start with, and then you add another 12 inches to it and you have a crawfish farm.

Mr. LONGLEY. But when you started this project, would you apply for a permit with the town or the parish?

Mr. SPILLER. I would apply for a permit with the Corps of Engineers.

Mr. LONGLEY. You did not have any local regulation that you needed to comply with?

Mr. SPILLER. Not that I am aware of.

Mr. LONGLEY. But you had to deal with a private corporation, the Bayside Corporation?

Mr. SPILLER. That was only to get easement to my property.

Mr. LONGLEY. To your property. Now what about the Spiller estate.

Mr. SPILLER. That is my property.

Mr. LONGLEY. And you, of course, were dealing with an attorney. You mentioned you had to make some bridge repairs.

Mr. SPILLER. That is correct.

Mr. LONGLEY. When you dealt with the corporation, the estate, the attorney, made the bridge repairs, were these people fairly forthcoming with what their expectations were of you?

Mr. SPILLER. With the Bayside Corporation?

Mr. LONGLEY. Right.

Mr. SPILLER. They were hard to deal with, I had to sue them.

Mr. LONGLEY. But they did deal with you.

Mr. SPILLER. That is correct.

Mr. LONGLEY. And they were clear in terms of what they finally expected from you, is that correct?

Mr. SPILLER. They were very clear.

Mr. LONGLEY. But now I notice that in the state level, you had to deal with the Forestry Commission and the Department of Wildlife and Fisheries, and on the Federal level you had to deal with the Corps of Engineers, the EPA, the Department of Justice and even invoke the assistance of your Congressman.

Mr. SPILLER. That is correct, and also the United States Fisheries and Wildlife.

Mr. LONGLEY. And you enlisted the assistance of again, a Federal officeholder, Mr. Tauzin, to attempt to deal with the Corps and with the EPA.

Mr. SPILLER. Yes.

Mr. LONGLEY. And even with that assistance, were they able to give you any kind of clear guidance as to what you needed to do positively to be able to pursue the economic development that you were trying to pursue?

Mr. SPILLER. No, they did not. They told me to basically put it back into the ground, abandon the project.

Mr. LONGLEY. Did they make any positive suggestion whatsoever?

Mr. SPILLER. That I could purchase or lease some other person's property and do this.

Mr. LONGLEY. Could you explain that?

Mr. SPILLER. Well, they do not consider that I own the property, but I could buy some other property, let us say, in a non-wetland area and do the same project, such as I could purchase some sugar cane—

Mr. LONGLEY. So their advice to you was do not bother with your own property, go buy somebody else's?

Mr. SPILLER. That is basically it.

Mr. LONGLEY. How do you support yourself, sir?

Mr. SPILLER. Right now, I am a manager at a golf course.

Mr. LONGLEY. And have you been pursuing that the entire time you were trying to develop this?

Mr. SPILLER. I was doing this also.

Mr. LONGLEY. Have you been able to recoup from your own property, the substantial investment of time that you have documented, and money?

Mr. SPILLER. Not all of it. I harvested 30 to 35 acres and I received \$5700 for that.

Mr. LONGLEY. Now you also testified—and I want to keep an eye on the time—that when the crawfish project was—when you determined that it was infeasible or impossible to get any kind of assistance from the EPA to deal with the problem of the crawfish impoundment, then you literally went to them to find out what you could do with your land in terms of the forestry?

Mr. SPILLER. Well, I did not ask them what I could do, I am telling them that I think that I am exempt under the 404 regulations which they are in charge of. And I had assistance from the Louisiana Forestry Association in finding these regulations.

Mr. LONGLEY. And so why did you think you needed to go to them to do what you already thought you had a right to do?

Mr. SPILLER. Because I have got to get this exemption. If I do not get this exemption, then they can come down—the Department of Justice can come down and do whatever they do.

Mr. LONGLEY. So what you are really saying is that in the first place, they could not tell you what you were required to do and in the second place, that even activities that you felt you had a legal right to do, you could not do without the threat that they were going to come in after-the-fact and blame you for doing what they

would not clearly tell you ahead of time whether or not you could do it. I mean, am I making—maybe this did not make so much sense. Is that fair?

Mr. SPILLER. I would say that is a pretty fair assessment.

[Laughter.]

Mr. LONGLEY. Thank you for your honesty.

[Laughter.]

Mr. DOOLITTLE. On behalf of all the members up here, we would like to thank the witnesses for their testimony and assistance they have rendered to these two task forces as we gather testimony from witnesses across the country.

Mr. Pombo will chair the next panel and we will excuse the witnesses and invite the next panel to come forward.

Mr. POMBO. [Presiding.] I would like to welcome Mr. Paul Davidson, who is from Baton Rouge. He is the President of the Louisiana Wildlife Federation, the Coordinator of the Black Bear Conservation Committee.

Also like to welcome Mr. Mark Davis, who is a lawyer in Baton Rouge, Louisiana. He is also Executive Director of the Coalition to Restore Coastal Louisiana. This organization has been active in the effort to protect and restore coastal wetlands.

And Mr. Murray Lloyd. Mr. Lloyd is an attorney from Shreveport, Louisiana. He is on the Black Bear Conservation Committee and a member of various national environmental organizations.

I welcome all of you and we will start with Mr. Davidson.

STATEMENT OF PAUL DAVIDSON, PRESIDENT, LOUISIANA WILDLIFE FEDERATION

Mr. DAVIDSON. Thank you. Good morning, ladies and gentlemen. I am specifically delighted to be here, a little nervous sitting next to two lawyers, but—

[Laughter.]

Mr. DAVIDSON. But I do represent and am President of the Louisiana Wildlife Federation, and I will try to focus most of my testimony on wetlands issues, but will touch on other land use policy as well.

I work in the field of natural resource management, am a landowner and a taxpayer. In my professional as well as my personal life, I promote activities that are sustainable, both economically and ecologically. As a landowner and taxpayer, I have serious concerns about some of the things I see coming out of Washington these days.

There is a basic law of physics that simply states "For every action, there is an equal and opposite reaction." In other words, we do not live in a vacuum. Our actions impact others.

As a landowner, I have had numerous experiences where adjacent property owners engaged in activities that adversely impacted me or my property. Regulation of private property is designed to protect the health, welfare and property of everyone in the community. I have not had much time to gather much documentation, but I do have written testimony that I would like to place into the record. It is from several property owners who have had their property adversely impacted and their property values diminished by adjacent landowners who failed to comply with existing regulations

and permitting procedures. While the permitting process may seem onerous for some, the truth is that less than one percent of the permits to develop in wetlands are denied. In the 22 years that the United States Environmental Protection Agency has been in existence, only 11 permits have been denied. That is from Beverly Ethridge, Region 6, EPA.

Development of wetlands has cost the American taxpayer billions of dollars. Eighty percent of the flood insurance paid to flood victims has gone to Louisiana and Texas. Hundreds of millions have been paid in Louisiana alone. What most citizens do not recognize is that flood insurance is a Federal subsidy.

I will tell you what happens when we develop in wetlands and flood prone areas. The real estate interests get their money up front, the mortgage banking interests get their money up front, the construction interests get their money up front, and from then on all the liability rests on the shoulders of the flood insurance program and the American taxpayer. In addition, taxpayers pay each and every time a flood disaster is declared. I will submit this brochure as part of my testimony. It is printed by a Federal agency and it states quite clearly that a homeowner's policy from a private insurance company will not cover flooding and your only protection if you live in a flood plain is from federally guaranteed flood insurance.

I grew up in an area adjacent to a subdivision that flooded periodically. I forget how many times I carried neighbors to dry ground but I will never forget the heartache and distress of those who lost most of what they owned. All this pain and property loss because the land was developed into something that was not meant to be. After 40 years and hundreds of thousands of dollars spent to improve drainage, the subdivision still floods and the American taxpayer is still paying the bill.

As a friend of mine stated in an interview the other day, "Promoting development in wetlands is like building a playground on the neutral ground of an interstate highway." We are courting disaster.

Crop insurance for flooded crops is a whole other can of worms. The cost to the American taxpayer is in the billions. I can take to a location not far from my home where there are thousands of acres of soybean fields on the banks of the Mississippi River. There is no levee between the bean fields and the river. The land produces a crop on the average of one in five years, the rest of the time it is flooded by the river. Each time the fields flood, the American taxpayer foots the bill. The fields are owned by an insurance company in Tennessee. Over the years, the American taxpayer has paid millions of dollars to the insurance company for activities that make no economic and no ecological sense. I will be glad to provide the name of the insurance company if you would like to verify this information.

I favor responsible development and support those who make their living off the land. But I believe in common sense and I believe in sustainability. The American taxpayer cannot afford to continue to subsidize activities that will never sustain themselves. We can and should support a transition to sustainable land use prac-

tices. A structure for sound wetlands management and a regulatory framework is necessary if this is ever to become a reality.

This structure exists today in the Section 404 of the Clean Water Act. Any weakening of this provision would be a mistake, damaging the economy and the environment. If anything, new measures are needed to ensure that the permitting process is enforced.

The Wetland Reserve Program is an example of what I mean. We can identify croplands that flood regularly and provide incentives for the landowner to convert to trees. The trees can then be harvested, the land can be utilized for hunting and other compatible outdoor recreation and more importantly, it requires no additional subsidies. This type of program will save billions of dollars over the years, will greatly improve water quality and the associated fisheries, will enhance groundwater recharge, and will reduce flooding as well as the need for high cost drainage projects. It is important to note that this concept has strong support from both the farming and the environmental community.

I have specific concerns related to the property rights controversy and the arguments about compensation for the so-called takings of property. If I understand correctly, this means that if a landowner is denied a permit to develop in a wetland, he or she must be compensated. Does this also mean that the landowner will still be compensated by taxpayer subsidized flood insurance should the property flood? It is absurd that the taxpayer will be liable both up front and after the fact.

In addition, if pending compensation legislation passes, the certain rush of new development in wetlands and the predictable losses from subsequent flooding could very well break the back of the flood insurance program.

Might I suggest something similar to the swampbuster provisions of the farm bill? It states that if a landowner converts a forested wetland to agricultural crops, then he or she cannot participate in any federally subsidized agricultural program. This has virtually stopped conversion to cropland and had saved the American taxpayer millions of dollars.

Might we then make things easier if we state that if landowners develop in wetlands, that they cannot participate in any relevant taxpayer subsidized program, including federally guaranteed flood insurance. As a taxpayer, I would certainly feel better.

I have spent quite a number of years working to find solutions to natural resource management issues that just continue to get more difficult as time goes by, and the demand for resources gets more intense. But I have seen some strategies prove to be very beneficial.

If you want to solve problems, you have to identify all the players and bring them to the table. To do otherwise will guarantee that all interests are not addressed. In a non-confrontational environment, identify the issues and work together to find solutions. This strategy has worked in just about every situation where we have tried it. You have to be willing to do things a little differently. But if you think about it, this is the way a real democracy is supposed to work—with everybody participating, not just a privileged few.

It is easy to complain and easy to blame others for difficulties in our lives. Working to find solutions can be difficult, but in the end, very gratifying.

My experience has been that the system works if one is willing to work with the system.

One of the biggest problems facing us today is the fact that conflict has become a major industry, an industry that costs Americans billions of dollars each year. Conflicts are great for keeping lawyers and consultants busy, so good that it is not in their best financial interest to find solutions. As long as there is a controversy, they have job security. We have seen some evidence of that today.

I greatly appreciate the opportunity to appear before you today and I hope that I have given you some ideas to think about. I am a strong believer in private property rights and also believe strongly in taxpayer rights. Taxpayers are giving too much to provide security for wealthy landowners and I can assure you that once they figure it out, they will not be happy. Again, thank you for this opportunity.

And as I mentioned, I have written testimony from a number of private landowners who have had their property adversely impacted by unpermitted activities, and specifically I included that of John Chaconas since that particular case has been the one that has been discussed on the floor of Congress. We have heard a lot of testimony today where we heard one side of particular projects and issues, several of which I know the other side, and I would just like to submit the other side of some of these stories.

Mr. POMBO. Without objection, it will be included in the record.

I would like to remind the panelists to try and stay to the five minute rule. Your entire testimony will be included in the record. But since you were not a lawyer, I let you go over.

[Laughter.]

Mr. DAVIDSON. Thank you.

Mr. POMBO. Mr. Davis.

STATEMENT OF MARK DAVIS, COALITION TO RESTORE COASTAL LOUISIANA

Mr. DAVIS. Thank you, ladies and gentlemen. I would like to express the thanks of Coalition to Restore Coastal Louisiana for being invited today.

To those of you who do not know much about Coalition, we were formed in the late 1980's to address the problem that Leighton Steward on the last panel briefly described to you, which is the problem of coastal land loss. While we have been regulating the development of half an acre here, an acre there, we were losing around 35 square miles of our coast land each year. That was not being addressed. So the Coalition was represented and still represents an amalgam of local governments, property owners and businesses, sportsmen, environmentalists and even recreational and commercial fishermen. It is an unusual coalition, to say the least.

I would also point out that—to depart a little from what Mr. Steward said—that is not an unrelated topic to what we are discussing here today. That 35 square miles per year that we are still

losing is not entirely natural. Clearly subsidence and compaction are a huge part of it, but it is because we have disrupted the natural system. We used to get freshwater and sediment that would replenish our marshes. We used to have vast unbroken tracts of our marshes. Through leveeing, canal dredging, oil and gas exploration, a whole range of activities, many of which we did for darned good reasons or at the time we did not know what the effects would be, we have created this situation. And many of those are activities that would be currently regulated—not to say that they would be denied, but they would be regulated. So it is important to put this land loss situation in an appropriate context. We have put ourselves in this position and we are going to have to work together to get out of it.

I would also like to say something about the structure of the forum. Again, we are delighted to be here. But quite frankly, there are a lot of voices that you need to hear that you are never going to hear in this type of format. I would encourage the committee to convene a series of workshops to facilitate a discussion in order to bring people out of their trenches. It is very difficult to bring people together if they are essentially on sequential panels and telling you what the problems are, rather than working together on solutions, because we are never going to get anywhere if we do not work together.

That gets me to what I think is the most critical at this point. We have heard a lot of rhetoric about wetlands and you will hear it from both sides. Quite frankly, when you get right down to it, the current wetlands program in this country neither protects wetlands well enough nor accommodates private interests well enough. Otherwise, I do not think we would be here today.

I think we have got to get past the rhetoric and get to the solutions. And to do that, I think we have to take a hard look at really how big is the problem. And many aspects of our current wetlands regulatory program work at least as well as other regulatory programs. That may be damning with faint praise. However, I think we have to accept the fact that there is a role for a regulatory program. Wetlands do provide benefits that cross political boundaries. You need some kind of foul lines within which to operate.

There needs to be a Federal role in that because, quite frankly, states and local governments are not capable of undertaking it by themselves. Here in Louisiana, we depend upon what happens up river to build our coast. It is important for us to be able to have a certain uniformity in that regulatory program as it is applied nationally.

That is not to say we do not need to make it work better, but that wetlands policy has to be based on the best science possible. And I think frustration with the administration of the current program is leading us into questioning the best science available. And I do not think that we should be substituting political judgments for what we wish a wetland were or were not. But we have to look to science, I think, to give us the best definition, and then I think policy and politics should enter into helping us decide how to use those wetlands.

And I think, of course, since at least in Louisiana, roughly 85 percent of our wetlands in coastal Louisiana are privately held,

there is no way you can make a regulatory program work if it does not accommodate and recognize legitimate private property interests and the fact that some of these areas will be used. But I think we have to make sure that we do not open a Pandora's box by assuming that all private activities are created equal. Some things make sense to do in our coastal wetlands, and we are going to do them, we are going to get oil and gas out. It is not the same thing as saying you ought to put a K-Mart into a salt marsh. You have to have enough of a regulatory program to keep out the things that make no sense and to help protect neighboring communities and neighboring property owners, so you are not confined to essentially throwing the neighbors in a march to the Supreme Court. Because that is really what any valid regulatory program does, it ought to protect public health and welfare while accommodating private interests.

Thank you.

[Applause.]

Mr. POMBO. Thank you. Mr. Lloyd.

[The statement of Mr. Davis may be found at end of hearing.]

STATEMENT OF MURRAY LLOYD, BLACK BEAR CONSERVATION COMMITTEE

Mr. LLOYD. He is good. Can I give him my five minutes?

Chairman Pombo, Chairman Doolittle, members of the task forces, thank you for this opportunity.

I am here today wearing many hats. I am an environmental attorney, I am a fifth generation landowner in the state of Louisiana, I am a businessman with interests in timber, oil and gas and farming. I serve on the Louisiana Governor's Environmental Task Force as well as the Statewide Wetlands Advisory Task Force on which since Thursday, I am now Chairman of the Non-Coastal Wetlands Committee for the state of Louisiana.

At one point, when we were beginning to work on the Louisiana black bear and the red cockaded woodpecker, I was at the same time Chairman of the Louisiana Forestry Association's Wildlife and Recreation Committee, while serving as Conservation Chairman for my state Sierra Club.

Some in the timber industry consider me a radical environmentalist. Some in the environmental community have labeled me a tool of the lumber interests. On the Black Bear Conservation Committee, where I am on the Executive Committee, my organizational affiliation is concerned citizen, my title is "Loose Cannon on Deck". I think Tom Bourland gave me that title.

I will mention three concerns I have about the reauthorization of the Endangered Species Act and then three things that I would like for you to take back with you to Washington, D.C.

I am concerned that these task forces have continued the game of putting forth horror stories, such as some that we heard today. One need only scratch the surface to see that some do not pass the smell test. The shame of this to me is that it distracts us from dealing with the real problems of real people. These are serious issues, we have got to stop playing this game of "my horror story can beat up your horror story."

I am concerned about the message that some in Congress have sent to people regarding natural resource legislation. Many are saying that although they agree with the goal of working together to find solutions to our problems, they are going to wait, because they are certain that you are going to do away with most, if not all, protections for natural resources. This message has been sent, this message has been heard, and I think we are going to all have to deal with the responsibility for this.

The most distressing thing I see today is the attempt by the Congress to deal with very complex issues of natural resource management through several simplistic umbrella approaches. I think that if this Congress to lob these cluster bombs of unfocused policy, then the effect will be that you will do to our country's natural resources what Congress did to the savings and loan industry. This time it will not only cost us billions of dollars to clean up the mess, but will also result in an irretrievable loss of resources.

Now that I have alienated you——

The Endangered Species Act is good law.

The findings, purposes and policies of the Act have not changed. Most people that I know who work with the Act agree, as I do, that most of the problems are not with the Endangered Species Act itself, but with the way it has been implemented and enforced historically. The vast majority of changes that are needed can be done administratively utilizing the inherent flexibility of the Act. For those who say that this is too little too late, I would argue to the contrary, that the more likely result will be more sooner.

Aldo Leopold, the father of the land ethic, said that there are two things that interest me, one is the relationship of people to each other; the other is the relationship of people to the land. Natural resource management only works when it is done person-to-person-to-person. The Black Bear Conservation Committee is a good model for making the Endangered Species Act work. The reason it is successful is that those of us working together know that we have to make it work; we cannot afford for it not to.

Awhile back, Tom Bourland—and I am sorry, Tom, for ruining your credibility—and I wrote a rebuttal letter to our local newspaper expressing the approach that I think we should strive for, and this was over a red cockaded woodpecker issue, by the way:

"There are many of us who know that we can no longer afford the luxury of being just a forest user or just a preservationist; that there is a place for wilderness as there is a place for the tree farm; that good forest management and good environmental practices are not mutually exclusive, but mutually dependent.

"Our community, our state and our nation do not need people to tell us that there are problems—we know.

"What we need is to shed the us against them mentality, meet on the common ground, roll up our sleeves and work out enlightened solutions. More will continue to be done by those of us working together than by all the finger-pointers among us.

"There is an old Chinese saying—he who first the first shot admits that he has run out of ideas.

"We have not."

Thank you.

Mr. POMBO. I would like to thank the panel.

Mr. Davis, how would you—with your experience, how would you balance wetlands protection with the protection of private property rights?

Mr. DAVIS. I think the first thing you need to do is come up with, again, a coherent basis for regulation, which I think we are still in the process of sorting that out. Again, I do not think that that is an inherent failing of the current regulatory process. I think we have to recognize that it is a maturing process. We are dealing, as was mentioned earlier, with a situation where the resources we are now trying to protect, you know, a generation ago we were trying to give people incentives to destroy, because they were viewed as worthless. We are learning.

So I think that the idea that you have to build a little flexibility in is a given. Secondly, I think that it is important to inject people into the public interest review. That is one of the things I think, as we have seen here in Louisiana—and I think Mr. Tauzin could vouch for this—is that we have had some pretty strenuous debates on some of our—the activities that people want to do in the marsh. But quite frankly, I think in the last 12 months, we have made more progress on understanding one another's point of views than we had previously. In part, because we have gone to more of a workshop approach, which has informed the regulators as to why people want to do what they want to do.

Mr. POMBO. We have done—in California, we have gone to the workshop approach in a couple of forest issues, was recently told by the Department of Forestry that no one there worked for the Department of Forestry and they did not have to abide by any decisions that came out of that group. It was interesting to me to have that kind of a response from a Federal agency to people like you and people that were on previous panels, who were really trying to work out a solution to local problems. You know, you criticized—in your opening statement, you criticized me in the way that these panels were set up, the way that this process was proceeding, and I do not know if you realize it or not, but in the two years that I have been in Congress, the other side of the story was not told in Washington. And I was not—I did not have the opportunity to sit through hearings in Washington and listen to both sides of the story.

The whole idea behind doing field hearings on the Endangered Species Act and Wetlands legislation is to give us an opportunity to go out and actually see and hear from people that live in an area. You might not have had a chance to testify before Congress before, I am not sure of that. But I am sure that your solutions to wetlands problems and endangered species problems are things that this panel needs to hear. Just as the problems that have been created by these Federal regulatory acts also are important that the members of this panel hear, and the members of Congress hear.

I have severe wetlands problems in my district, but they are nothing like what you have. I mean, if we had wet ground like you have, we could not even put cattle on it. I mean, we could not do anything that you guys are doing down here. I mean, we have got dry ground, ground that looks like the floor of this room, that we

are told is wetlands. And you cannot build on it, you cannot farm it, you cannot do anything.

So the different problems that exist throughout the country, it was important to me, it was important to the Chairman of the full Committee that the members of these task forces get out and actually hear what people have to say.

Now you might not agree with the things that were said on a previous panel, and they might not agree with things that you say. But we need the information. We need to hear what the stories are that are out there, and what possibilities are out there. I believe that in each of your prepared statements, you talked about the protection of private property rights. So that is something that we can agree on, that we need to protect private property rights. How do we go about protecting private property rights at the same time that we are protecting what are real wetlands.

All of those answers are the things that we are here for. That is why we wanted to listen to panels.

In the two years that I was in Congress—now there are other members sitting here who have been here a lot longer than I have—but in the two years that I was in Congress, we did not have this opportunity. We did not have the opportunity to go out and listen to people. We are trying to change that, we are trying to find solutions to these problems. You know, whether it is Endangered Species Act, whether it is wetlands, whatever the regulatory Act is, we are doing the best that we know how to get out to the people and listen to what their problems are. Whether I agree with your solutions or not, I need to hear them, so that I can base whatever the new Act is going to look like on what real people feel is the solution to those problems. That is what we are trying to do.

Mr. DAVIS. I appreciate that. And first of all, I did not mean to diminish the value of these field hearings. I just think that they need to be a component to your fact-finding.

Mr. POMBO. Well, you did diminish the value of these field hearings and you did very clearly in your opening statement do that. And I was just trying to explain to you why it is important that members of Congress from California and from Minnesota and from Oregon have the opportunity to see and hear exactly what is going on in Louisiana, because Billy can talk to me every day—and he does—about what is going on in Louisiana, but if I do not see it, I do not know. And that was the whole idea of going out and doing these hearings.

My time has expired, but I am sure Mr. Vento will have a number of questions for you. So thank you.

Mr. VENTO. Thank you, Mr. Chairman.

When we hear the specifics in terms of a permit or an issue, we obviously need to look at both sides of what is taking place. It is a concern to all of us that there is not better communication, if they are having difficulty. So most of the members, hopefully, will be able to sort through and be objective enough to recognize that the agency is out here trying to do the best job they can. I guess you assume that they are operating in good faith, but I do not think that everyone maybe that is being affected by it at the time—I think we get about 99 percent emotion and about one percent rationality when you are being affected by it. So it is a difficult issue.

But I think, Mr. Davis, you point out in your statement that there are some 120 different business, civic and other organizations that are working right here in Louisiana in the coalition that you are working with, is that correct?

Mr. DAVIS. That is correct, sir.

Mr. VENTO. One of the issues that came up, of course, is the issue of the levees and the loss of wetlands here. And I would say yes, wetlands are different here. You know, I noticed one of the previous panelists that was in the National Coalition had said that the definition ought to be if there is not water there, it is not a wetland. But the issue is that in some places, it is the aquifer, in some places it is groundwater and in some places it is the clay lens, but it is still a wetland in those environments. That is the nature of the wetlands.

I guess the National Academy of Science is going to come out now with a broader definition, and hopefully, since everybody wants to have the science, they will find some common ground in terms of that definition.

But in Louisiana, there are catastrophic events going on here in terms of loss of what is referred to as these coastal wetlands, which you are concerned about. As you said, 20,000 to 25,000 acres a year are lost. There has been some discussion about building levees to try and avoid that loss. What is your response that? Can we in fact do something to mitigate the loss by building more levees and so forth?

Mr. DAVIS. Well generally, no. I mean, levees can provide very important localized protection. But they can be very expensive, and to protect our coast from what we are experiencing, you cannot build a dike, partly for the reasons that were discussed earlier, it will subside. The cost of building walls through our marsh is far too high, not only in terms of what the taxpayer expenditure would be to build them, but also in what you lose in the bargain, and that is these are estuaries which depend upon fish and other marine creatures coming in and coming out. Those are real jobs, it is a \$2 billion a year industry in this state. So when you are talking about how you really ought to come up with a strategy that works for Louisiana, it needs to be something that takes into account those factors as well.

Again, that is why here in Louisiana, balancing private and public rights is not an academic discussion, because you have public resources on private land. And that is where many of the fish come from, and the shrimp.

Mr. VENTO. Let me just say on the property rights issue, I think the wetlands are a great example of why we do not want to get into regulatory compensation, because if someone does modify their wetlands, there is a public interest, they are affecting a lot of other private and public lands in the process of modification. So I think the argument, in my mind's eye, loses validity in that instance, because if you modify the wetland, you are affecting other people's land. Even though someone says well my impact, my footprint here is only on one acre, but if you multiply that by thousands of land-owners, you end up with a dramatic impact in terms of this particular area, is that right?

Mr. DAVIS. Well, that is kind of how we got into the situation we are in, in that an individual oil and gas canal has a relatively small footprint and even the secondary effects of one canal are not that big. When you put thousands of them out, you end up with some of the problems that we have in places like Terrebonne Parish.

Mr. VENTO. What do you see, Mr. Davis, as the connection between the 404 regulation program and the coastal restoration program? Is there a connection?

Mr. DAVIS. Yeah, I think there is. Again, not only because, as I mentioned, some of those activities that have helped get us into this situation, would not be subject to regulation, but we are talking about spending, you know, actually several billions of public dollars, state and Federal, to restore sustainability to our coast. And that is actually sustaining private land as well. Keep in mind that this is not something which—you are not merely trying to protect fish, you are trying to protect communities and things like that.

Mr. VENTO. Yeah. Let me go on to Murray for a question because my time is about to run out.

It sounds like you have done some good work in terms of the black bear conservation. Why has similar effort not been initiated with regard to the red cockaded woodpecker in the area, on a statewide basis?

Mr. LLOYD. Well, actually we tried to do that at one point. I think the main reason that it has not been done with the red cockaded woodpecker—let me say up front, I think it can be done—I think that you have a situation with the red cockaded woodpecker where there are interests in the state that are trying to keep it from happening. You have heard the woodpecker has been on the list for 23 years, since before there was an Endangered Species Act, and Louisiana is still taking a wait-and-see attitude. Well, they are taking a wait-and-see attitude because if we wait long enough, we are not going to have a problem with red cockaded woodpeckers on industry land.

When I was Chairman of the Louisiana Forestry Association's Wildlife and Recreation Committee, I tried to hold a meeting to begin the process of dealing with red cockaded woodpeckers' management on private land and they refused to allow my committee to meet. We are going to have to deal with that. We can keep waiting, we will wind up with woodpeckers on public lands and on small private landowners.

The red cockaded woodpecker can be dealt with. I think your suggestion of a statewide ACP effort is a good one. I think that is probably the most effective way to deal with it right now. Louisiana is the one state that has not gone forward with that. I hope we do.

Mr. VENTO. Thank you. My time is up.

Mr. POMBO. Thank you. Mr. Doolittle.

Mr. DOOLITTLE. Thank you.

In the testimony we have heard, even from your panel and from the previous one, there was at least the implicit assumption I think and sometimes it was actually expressed, that one; there should be more voluntary cooperation along the lines perhaps of this Black

Bear Conservation Committee, it seems to be a very good example of interests working together to resolve the problems.

The other point is that—and it has already been mentioned, and I guess I would ask you gentlemen if you agree with this—there ought to be more incentives to the landowner to manage say the threatened and endangered species that may be there, and to conserve wetlands. How do you feel about that?

Mr. LLOYD. You are absolutely right. One of the big successes for the Louisiana Black Bear Conservation Committee was through the Wetlands Reserve Program, which I think needs to be addressed during the farm bill discussions this year. Louisiana was one of the first states to participate in the Wetlands Reserve Program. It is a very popular program. We had several thousand acres sign up to participate. Unfortunately we had limited funding. One of the things we did was if those areas that were put up for Wetlands Reserve Program were in occupied bear habitat, the landowner got on a priority list for funding. I think that is something that should be written into the Wetlands Reserve Program, it was very effective.

I think when you deal—switching over to wetlands, I think one of the first things we are going to have to do is remove a lot of the Federal disincentives which are involved in wetlands destruction. I would love, you know, to have incentive programs. I think one of the best incentive programs to help wetlands in south Louisiana would be to promote the development of a value-added products industry to help diversify our economy and take the pressure off of direct use of the raw resources and provide some economic stability as well as environmental stability for this community for coastal zone.

Mr. DOOLITTLE. Did you gentlemen wish to comment further?

Mr. DAVIDSON. I am real supportive of volunteerism and incentives, but would just like to say, you know, that they never work unless you have some regulatory or some heavy handed, or seemingly heavy handed something promoting that effort, because it takes a lot of effort to pull together diverse interests and get them to sit down at the table and work. It does not just happen. It is harder to do things that way than it is just to read a rule book and do things a certain way. You know, if we want to believe everybody is just going to do the right thing, let us just take all the signage down off the highways and just assume that everybody is going to drive at a reasonable rate of speed and we will all be healthy.

But you know, you need that regulatory framework to provide some impetus to the efforts that are required for volunteer efforts like the BBCC and the Coalition. I mean, there are certain things that brought these people to the table and in many cases it is fear of the unknown, it is fear of government regulation, but we tried to promote working together and tried to be inclusive and anybody that ever comes to us with a problem, we try to address.

And I get a little aggravated with, you know, farmers who, for instance, want to say they want the government out of their business. Well, you know, it is subsidies that give stability to farm prices, it is subsidies that give stability to farm land prices. And if it was not for American taxpayer subsidies, farmland values would be jumping up and down, farmers could not borrow money

to put in their crops. So you know, there are a lot of taxpayer dollars that go into maintaining security for farmers. And I am certainly pro farmer, but if you are going to say I want the government out of my business, then let us get the government totally out of their business.

Mr. DOOLITTLE. Well let me just observe though, you know, you say fear, there is real fear in California and the Pacific Northwest, the far northern part of our state. We have eliminated 30,000 jobs because of the spotted owl and we are now set to eliminate thousands more because of the California spotted owl. So these people have real fear. And yet nothing constructive has been accomplished. Our forests are in a disastrous condition.

I think one of you mentioned that these policies really are not working very well. They are not working very well for the conservation of the wetlands, or I suppose we could add the endangered or threatened species. And they are not working very well for the private landowner. So we have got to get to a point where we change this. That is what these hearings are about.

Mr. Davis, did you want to comment on my general observation?

Mr. DAVIS. Well yeah. The short answer is yes, you bet we need more incentives. I think what I would like to see, especially as we have seen more a move toward I guess watershed planning and things like that, I think you should have general permits, things like that, which encourage people to engage in activities that are consistent with those plans. And I think if you are going to be denying or conditioning permits, then you at least should look to those plans. A good example is our restoration plans here in Louisiana.

If you are going to regulate a coastal activity, one of the most—I think one of the most coherent reasons to do that is that it may not be consistent with a multi-million dollar public restoration project that is slated for the same area. That is at least coherent. And again, I think to the extent you can encourage someone to act independently in concert with those plans, you ought to in any way you can.

Mr. DOOLITTLE. Thank you.

Mr. POMBO. The gentleman's time has expired. Mr. Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman.

Mr. Chairman, members of the panel, all of you have talked about the need to work cooperatively with Congress and government agencies, citizens, to make these laws work better. I was being interviewed outside and one of the reporters told me that environmentalists today were saying that these hearings were a sham, what was my comment about that. Does any one of you consider these hearings a sham?

Mr. DAVIS. I guess I will answer first. I do not consider them a sham, but I do think that it is important to add more to them. As I said—

Mr. TAUZIN. I think you made that point, Mark.

Mr. DAVIS. I am certainly not, you know, the be all, end all for people with an interest in coastal restoration. There are many points of view that you need to hear.

Mr. TAUZIN. Sure. Either one of you other witnesses call them a sham publicly to the news media today?

Mr. DAVIDSON. I would suggest that these hearings need to provide more opportunity for actual citizens to speak.

Mr. TAUZIN. I understand that. But did any of you call them a sham, any one of the three of you?

Mr. DAVIS. I did not.

Mr. DAVIDSON. I might have.

Mr. TAUZIN. You might have.

Mr. DAVIDSON. I might have.

[Applause.]

Mr. TAUZIN. Then obviously you have some support for that proposition in the audience. You consider them a sham, why, Mr. Davidson, because we did not hear enough people? What is the problem?

Mr. DAVIDSON. Again, I am not sure that I said it, but I might have, and it is a good chance that I might have. But you know, I had several people call me over the last several weeks for my suggestions as to who might speak to this panel, and consistently they said we want the average citizen, we want fishermen, we want alligator trappers, we want hunters, we want farmers and all that. And then when I see that there is a CEO for a Fortune 500 company speaking on a panel that I had been led to believe was going to be average John Q. Public. And I have nothing against Mr. Steward, but—

Mr. TAUZIN. Is that the reason you think it is a sham, because Mr. Steward testified?

Mr. DAVIDSON. Not at all.

Mr. TAUZIN. Well I do not understand.

Mr. DAVIDSON. I mean, there needs to be some consistency, when we are trying—I mean I put a lot of effort into trying to find some people around the community who were fishermen, hunters, trappers.

Mr. TAUZIN. I thought we had fishermen here today. Are you telling me that Mr. Rickey Matherne is not a fisherman?

Mr. DAVIDSON. Oh, not at all, not at all.

Mr. TAUZIN. I am a little confused. Let me get into some of your testimony. You said you had specific concerns about the so-called compensation for takings. You said, if I understand you correctly, this means a landowner denied a permit to develop a wetland, he or she must be compensated.

Let me correct you.

Mr. DAVIDSON. Please do.

Mr. TAUZIN. The bill offered, passed in Congress, did not say everybody gets compensated for failure to develop a wetland. It said very specifically that you do not get compensated where the primary purpose of the restriction is to prevent damage to a neighbor's property or to enforce a nuisance law in the community, such as flooding ordinances, flooding protections, or to enforce zoning laws that are customarily imposed upon communities by counties and cities and local authorities. It is only when the sole purpose, primary purpose is to say we want this wetland protected for wetland values, therefore you cannot use it, that the compensation applies. So be, I hope, corrected in that view.

Mr. Davis, first of all, let me tell you that I very much appreciate the work your Coalition has done and is doing.

Mr. DAVIS. Thank you.

Mr. TAUZIN. I think we need more of it in the state. Unfortunately you came out against the takings bill, your organization did, only to find out that many of your members supported it, I think, later on. You do say in your statement that if the application of a wetland regulation constitutes a taking, adequate laws and procedures exist to protect landowners. Do you think Mr. Boles, who filed the lawsuit ten years ago in Texas, who owned a single lot in a subdivision and was told he could not build his house there, took him ten years to get compensation in the Federal court system, that that represents adequate laws and protection to private landowners?

Mr. DAVIS. I do not know the facts, I do not know Mr. Boles personally, but I do think that it works as well as anything that is going to be put in its place. I think that we—

Mr. TAUZIN. Well you also say that you would support administrative procedures to expedite the handling of takings claims. That is what the bill did. It did not create any new rights, all it did was set up administrative procedures to handle takings claims. I only call that to your attention because you say that in your testimony and yet you came out against the bill which did exactly that. I would just urge you to look at the bill itself for what it said, not for what some press reports or what some agency said.

Finally—I know my time is out, but I wanted to ask you one thing, Mr. Lloyd. You said the Endangered Species Act is good law. Do you think it is good law for us to say that we have to protect a species regardless of cost, you cannot consider the cost of what it did to fishermen like Mr. Rickey Matherne and others?

Mr. LLOYD. No, sir, I do not, and that is why I think the Endangered Species Act is good law, because it does not say that—it does not say that.

Mr. TAUZIN. Do you think it is good law—I am out of time—do you think it is good law also that we base our decisions in that Act on what is called best available data, the acronym for which is BAD science, B-A-D, and produces a result—the National Wildlife Federation, for example, on the alligator listing said the story is familiar, gratifying, mostly wrong. It now appears the animal never should have been placed on the Endangered Species list. Recent evidence suggest the 'gators were thriving in most parts of its range throughout the 1960's, albeit at somewhat lower population levels.

I do not have time, but I could cite you many examples of improper listings based upon a criteria of best available data. Do you not think we ought to change a law that produces that kind of result?

Mr. LLOYD. No, sir.

Mr. TAUZIN. You do not think we should. Thank you very much.

Mr. POMBO. Thank you. Mr. Cooley.

Mr. COOLEY. Out of respect for the Chairman, I am going to behave myself. I am having a very difficult time, of course, but I am going to do that.

Mr. Davidson, what do you do for a living?

Mr. DAVIS. I am the Executive Director for the Coalition to Restore Coastal Louisiana.

Mr. COOLEY. Davidson.

Mr. DAVIDSON. I am the Coordinator for the Black Bear Conservation Committee. I keep all these timber companies and state and Federal agencies and conservation organizations and eight universities working together—eight universities doing research on bears, using that work, that data to make determinations as to how we need to, and could, best restore black bears.

Mr. COOLEY. So you really do not understand the process of making the bottom line provide income for people, what working people do in order to survive in this society, in order to live here, you have never lived——

Mr. DAVIDSON. Prior to doing this, sir, I ran a business that sold for \$3 million when the owner died. Prior to that, I was self-employed for 12 years and I know all about that kind of stuff—trust me.

Mr. COOLEY. You must be angry at the system.

I want to tell you something, Mr. Davidson, I represent District 2 of the state of Oregon. It is larger than the entire state of Louisiana, it is 73,000 square miles. I have 64,000 people out of work because of the Endangered Species Act and the way it has been interpreted. We cannot even cut sustainable yields because of the Endangered Species Act. It is not a good law because there is not the proper balance between the environmental groups and those who want to use our natural resources, even in a well-managed way, because was overloaded due to our feeling of guilt by a bunch of environmentalists who dominate this, people from New York that have no idea what is going on out there.

Right here in your own community—I know you have got your head up and down—one thing is, do not come to Oregon, because you are in trouble. Number two is that you had 200 fishing families along the bayous that we went to yesterday, because of your environmental laws, you have 25 boats left today. I do not think that is a good law.

Mr. DAVIDSON. Well it may be that 70 percent of the shrimp in this country are imported from out of the country, you know, there may be some other factors.

Mr. COOLEY. That is fine, but 200 boats could make it before, now they cannot. There is a difference. That is enough.

Mr. Davis, when you talk about the loss of wetlands in Louisiana, what do you contribute those losses to?

Mr. DAVIS. It is a combination of things. It is essentially human activity combined with natural forces.

Mr. COOLEY. Human activity combined with natural forces. Could you be more specific on human activity?

Mr. DAVIS. Sure. Again, building of levees, navigation canals, oil and gas exploration, some conversion to agricultural.

Mr. COOLEY. OK. So what you are really saying is that we want to go back to the time, in order not to lose this land, and we move the levees we have here to allow nature to increase the wetlands, is what you are really saying. You are much like the people I have in my district that want to move all the dams off the Columbia River.

Mr. DAVIS. Sir, may I respond to that? I do not think—sir——

Mr. COOLEY. Mr. Lloyd, you said——

Mr. DAVIS. Was that a question, sir? Because I think it is a gross mischaracterization of what we are doing here.

Mr. COOLEY. I know. Mr. Lloyd, on value-added products—

Mr. DAVIS. I am glad you acknowledge that.

Mr. COOLEY. Mr. Lloyd, on value-added products—

Mr. LLOYD. Yes, sir.

Mr. COOLEY [continuing]. what would you like to add to the value here to try to offset the loss of income for people? What are the suggestions to do that?

Mr. LLOYD. Most of the resource—this is a very resource dependent state, as are many of yours. Most of the resources we produce in this state we send out essentially raw, unprocessed. We send out a lot of raw timber, we should be making it into furniture. We send out a lot of seafood raw, we should be processing it in this state and adding value to those products, and diversifying. Our agricultural products, we should not be just shipping out sweet potatoes wholesale, we should be turning them into frozen sweet potato patties and selling those value-added products in this—the coastal zone of Louisiana is so highly impacted by the outer continental shelf off-shore drilling in this country, we have got to do something to offset that impact. And the way we do it is to create this value-added products industry. I have got to believe that there is a mechanism, a combination of mechanisms, to fund that effort. At least there is some type of low-interest loan.

Mr. COOLEY. Thank you very much.

[Applause.]

Mr. POMBO. The gentleman's time has expired. Mrs. Chenoweth.

Mrs. CHENOWETH. Mr. Chairman, I find this testimony fascinating.

Mr. Davidson, you indicate that the Wetlands Reserve Program is another good example of what you were talking about in your testimony. We can identify croplands that flood regularly and provide incentives to the landowner to convert to trees. What kind of incentives would you provide to the landowner?

Mr. DAVIDSON. The Wetlands Reserve Program is a program that was provided in the 1990 Farm Bill that provides a mechanism for the Soil Conservation Service to supervise a program where landowners make a bid to Soil Conservation Service and the government essentially gives them fair market value for their land plus 75 percent of the restoration costs. They restore this back into trees, it must stay in a forested condition in perpetuity, but they can harvest the trees, they can lease it for hunting, whatever. And essentially what you do—we have literally tens of thousands of acres down here in the lower Mississippi River Valley that were cleared for soybeans back in the 1950's and 1960's and early 1970's when the price of soybeans was \$10-\$12 a bushel. They are too wet to make a crop. the farmers really depend on crop insurance to be able to stay in business. And what we are trying to do is afford an opportunity to move from subsidized agriculture in areas that will never sustain themselves into—transitioned into sustainable forestry.

Mrs. CHENOWETH. Mr. Davidson, how would these people make a living then?

Mr. DAVIDSON. Well, one of the things we are working with partnerships with—well, for one thing, they are getting value of the land and in many cases when you are talking about thousands of acres, it could be, you know, a lot of money.

But one of the partnerships that we are developing—and this is relatively new and we are working on it, but we are trying to be innovative and we are trying to get input from everyone.

Mrs. CHENOWETH. Mr. Davidson, before you go on, let me state to you, I will make my questions very short and concise if you can make your answer very short and concise. Is that a promise?

Mr. DAVIDSON. We can try, but these are not simple answers.

Mrs. CHENOWETH. OK.

Mr. LLOYD. Mrs. Chenoweth, can I address that? The great thing about the Wetlands Reserve Program to me is that it leaves the property in private ownership. We are not a big believer in Federal ownership down here. We try to limit it to at least below 10 percent, and I hope we keep it there.

Mrs. CHENOWETH. So the land—

Mr. LLOYD. The land that is put in the Wetlands Reserve Program is still very productive land. It either goes into forestry or grasslands. If it goes into forestry, they are allowed to harvest as they would under any normal forest management plan.

Mrs. CHENOWETH. Thank you, Mr. Lloyd.

Let me pursue my line of questioning with Mr. Davidson. Who would pay the taxes on this land?

Mr. DAVIDSON. It is still private land.

Mrs. CHENOWETH. So the private landowner would still pay the taxes.

Mr. DAVIDSON. Right. And there are ways he can get income. We can work and we are working in partnerships with timber companies where they go in, help the landowner plant cottonwood plantations where they get return off the land all during this time while the intermittently planted high quality hardwoods are growing. Yield for cottonwood plantations is six tons per acre per year, they get \$10 per ton per year, which is really—they will make at least as much or more than they would if they were making a crop off soybeans.

Mrs. CHENOWETH. Mr. Davidson, I am fascinated with your program, and I really would like to study it more. But would you be willing to send me some written documentation?

Mr. DAVIDSON. I would love to.

Mrs. CHENOWETH. Mr. Davis, I am fascinated with your testimony, probably more fascinated with what you did not read than what you did read because you said "Wetlands regulations are not any different from any other restrictions on personal activities or land use and should not, in all fairness, be judged by a different standard. Certain activities sometimes are criminal." But you go ahead to say, "In short, a taking is a taking is a taking, and there is no need or justification for a special rule for wetlands." What do you mean?

Mr. DAVIS. Essentially under the jurisprudence in this country, we have essentially had one standard for determining whether or not an activity, a regulatory activity constituted a taking, whether that was a zoning rule or an endangered species or a wetlands rule.

And in fairness to all property owners, if you have a property owner who is told you cannot build a shopping center because the area is zoned residential and next door it is a jurisdictional wetland, and that person is told you cannot build a shopping center because it is a wetland, they should both be judged by the same standard. They have both been denied the same opportunity. So that is what I am talking about there, is the standard for evaluating whether or not you open the public checkbook and write a check should be the same regardless as to what the regulation is. It should be based upon what you are denying the property owner the right to do.

Mrs. CHENOWETH. Mr. Lloyd, you are an attorney and you gave a rather indicting statement about the previous panel members. You said "One need only scratch the surface to see that some of these do not pass the smell test." You know, the thing that I was most impressed with, with the former panelists was how they really did try to cooperate. Do you believe that Mr. Matherne does not pass the smell test in his activities?

Mr. LLOYD. I do not know Mr. Matherne and I would not like to comment on these.

Mrs. CHENOWETH. Are there any of these panelists that you know personally and could tell me, on the record, who does not pass the smell test?

Mr. LLOYD. Yes. If you would like me—I would rather not go into specific names, but I will be glad to. This business with critical habitat over the black bear is an issue that we have been dealing with for over a year. These same bogus charges about critical habitat designation for the black bear were raised a year ago and we dealt with them, and contrary to what was said, the Fish and Wildlife Service has been exemplary in answering people's questions and legitimate concerns—and there were some legitimate concerns. Those concerns were presented to Fish and Wildlife Service, they have responded to those landowners, and there is a cottage industry going on with the critical habitat for the Louisiana black bear.

Mrs. CHENOWETH. Do you think—

Mr. LLOYD. And the cottage industry is to maintain conflict. There is a lot of misinformation going on and it is being done on purpose.

Mrs. CHENOWETH. Do you think that when it takes an agency two years to respond to a letter, that passes the smell test?

Mr. LLOYD. I am not sure what you are talking about.

Mrs. CHENOWETH. Mr. Spiller, when he sent a registered letter—

Mr. LLOYD. I am not familiar with Mr. Spiller's situation.

Mrs. CHENOWETH. I would encourage you, before you make these kinds of public indictments—

Mr. LLOYD. I was not commenting on Mr. Spiller's situation.

Mrs. CHENOWETH. Thank you, Mr. Chairman.

Mr. POMBO. The gentlelady's time has expired. Mr. Radanovich.

Mr. RADANOVICH. I would like to make a quick comment or kind of an overview. I guess nobody is up here complaining or saying that you gentlemen do not have something to offer because I think you have got some good ideas. What I do see a problem with is how we as a nation are going about this thing. Nobody can disagree

that things are wrong. Murray, you said the Department of Fish and Wildlife, has been exemplary. Well, you ought to come to my district, because they are not exemplary there. We have Sierra national forests in our district and three years ago, there were three logging mills that used to log out of the Sierras, now there are none, they are all shut down. They decreased the board feet that you can take out of the Sierras by about 90 percent, calling that a sustainable yield. There are some real problems here.

I think the more we look at how to solve it, we will find, as I stated before, that the solution is to reduce as much control as we can down to the local level. Now one of the other gentlemen, I think it was Mr. Davis, suggested that we still need a Federal Government because Louisiana is at the bottom of the stream that drains—you are dealing with about 32 states I guess. I can understand that, but my statement is that you could deal with the situation if you took about 80 percent of what the Federal Government does on this issue and shifted it back to the state and local level. If you did this you would be a lot better off when solving your own problems. That is the point that I wanted to make, because that is what is driving this whole thing from Washington right now.

Also, Mr. Lloyd, I guess about the only other statement I have is that if you are using what you call value-added products, what are you going to do with all the people that you are going to have to make room for in establishing a furniture assemblage business. A lot of your problems are growth impacts, are they not? And yet, what you are proposing seems to be in addition to that.

Mr. LLOYD. Well, my proposal is to diversify the economy of the coastal zone in Louisiana to take some of the pressure off of using the raw resource. If we are over-harvesting pine saw timber in the state of Louisiana by something like 25 percent, then we need to stop doing that. We need to put those people to work—those people to work in making other products from forestry. Same thing with the seafood. I am not asking anybody else to come to Louisiana, we are real happy with what we have got and we would just as soon use it for ourselves but—

Mr. RADANOVICH. Well, the problem then seems to be determining what is the sustainable yield. I will give you a case in point. In my forest they have been harvesting 125 million board feet off for about 100 years. Recently they have reduced it down to 25 million board feet and that is what the Sierra National Forest is now calling sustainable yield. So, I do not get it. There ought to be a hard number that you can work around. Their plan to retrain all these people that are going to be out of work from the sawmill shutting down is to teach them basket weaving or something. Something they can make and sell to the tourists along the road as they are driving on up to Yosemite.

So it just does not work. And I think somebody should get a hard number, at least on this issue, on what sustainable yield is, or how many turtles are out there, for God's sake. Once you know these things, then you would be able to develop some kinds of plans around them.

But I will still make the case that you will be better off taking care of your problems on a local level—not a 100 percent solution, but as close as you can get to it, with a lot less frustration.

Mr. LLOYD. One of the requirements that we had when we first started the Black Bear Conservation Committee was to be a member, you had to be from our area. National groups were very much interested. They could participate but they could not be voting members of the committee when we first got started. I would like nothing more than under the Endangered Species Act, for you to put a lot of budgetary emphasis on Section VI and the ones before that, so that we can deal with these problems at the pre-listing stage. We have discussed the pre-listing conservation agreement area as one that I would like to see.

Mr. RADANOVICH. Yes.

Mr. LLOYD. I do not know how you arrive at all these solutions. I know down here we just—you know, there are a lot of things going on. We try to pick our solutions and run with them. We do not allow the Federal Government to do the stuff that they have done where you live, by making them come to the table and listening to us.

Mr. RADANOVICH. Well, I guess my final comment is that these hearings are not a sham. I think you should be careful of the words you use because if you do not like the direction we are going in Washington, really what you are endorsing is big government. Nobody likes that. So I just wanted to make that point.

Thank you.

Mr. POMBO. Thank you. Mr. Thornberry.

Mr. THORNBERRY. No questions.

Mr. POMBO. Mr. Metcalf.

Mr. METCALF. I will be very brief. We have so many significant species that are endangered, but we have got little things like a little snail as big as my fingernail or the snail darter which is a little fish that—for those things, I do not think we know that they are just limited, I just do not think we know that they are.

How would you react to changing the Endangered Species Act in just this way—and you can answer really briefly—to say significant species that are endangered, instead of all.

Mr. LLOYD. I think you would make the Endangered Species Act the lawyer's full employment act for 1996, if you did that. I do not think you need to change the Act to put that emphasis into the regulations. I think that is a good idea. You know, people say we were lucky we chose the black bear because it is such a big, charismatic, megafauna and it is easy to get people interested in saving the Teddy bear. But the reality is the bear effort represents a multi-species approach, if you think about it. Everything we have got in Louisiana falls under the pyramid of the bear and we are managing for the bear, but we are also managing for those little bitty invertebrates. We are managing for pear shellmussels, we are managing for everything. And that is the approach we need to take. That, again, is a reason for concentration on Section 6, letting the states be the lead agencies in dealing with these multi-species approaches before they are listed.

Do you really not care about that, whether it is significant or not?

Mr. DAVIDSON. Well, who is to say what is significant. when the good Lord made all these creatures, he probably thought they were significant. But you know, wildlife of all sorts is an indicator of

quality of life. And when we see species getting into trouble, it is sort of a red flag for us to sort of take note. And I know—and I consider myself young—but I know a lot of places that I used to swim as a kid where the water was crystal clear, that now are all silted in. You know, you do not have the fisheries production you had in there before because there is no light transmittance into the stream. The thing silts in, it exacerbates flooding in adjacent areas because erosion from areas—riparian areas that are now plowed and farmed erode into the stream bed, fill in the stream bed, it floods other areas. You know, there is a lot of—you know, we have discussed numerous times that problems vary all over the country, and they certainly do. And Louisiana gets 50 to 70 inches of rain a year. And before we built levees, people built homes on stilts. Maybe we need to look at maybe building homes on stilts. It would save the taxpayer a lot of money if we did that, and I certainly would not mind living in a house on stilts. Why are we not promoting these sorts of things? But we are promoting things that are not sustainable. You know, we are promoting people building a house on the ground in an area that floods. Now that just does not make a whole lot of sense to me. And I know it was not about endangered species.

Mr. POMBO. Thank you. Mr. Longley.

Mr. LONGLEY. Thank you, Mr. Chairman. I just have a short statement.

You know, I came down, got into Louisiana yesterday about 1:00 or 2:00 a.m. in the morning and I just want to note for the record that it is now 1:00 p.m. Monday afternoon and on my part, I want to thank those of you who came out and were listening patiently and particularly the witnesses that participated. But I just want to note for the benefit of the panel that I have got a meeting at about 4:00 that I am going to be an hour late for and that meeting is going to consist of the representatives of the largest cities and towns in my state who are coming to Washington to tell me about the hundreds of millions of dollars in waste, wasted expenditures, that they are being forced to spend based on convoluted Federal policies that have not met the smell test on the local level because of what I will refer to as blanket application of abstract theory in situations where it does not fit.

And I only want to point out for your benefit that frankly I appreciate the constructive testimony, I do not appreciate the negative testimony, and I just want to point out for the record that the eight witnesses that spoke before you did not have a single criticism to make of the ideals of either the Endangered Species Act or the Wetlands. In fact, each one of them affirmatively embraced the objectives of the statutes, but said that they were not, in application, being applied fairly or even working. And I think Mr. Matherne testified that in 23 years of fishing he had yet to see a single case of a dead turtle in his nets. And I think that you might have an awful lot more to gain by recognizing that constructive application of these statutes, in the sense that people are trying to find a constructive way to see that the objectives are achieved.

I have no further statements. And again, Mr. Chairman, I appreciate the opportunity to be here today.

Mr. POMBO. Thank you very much.

I would like to thank all of the members of the panel for testifying. I look forward to working with you in the next several months here and hopefully we can come to some solutions to the problems that you have presented before us. Thank you.

I would like to just briefly recognize Mr. Tauzin.

Mr. TAUZIN. Thank you, Mr. Chairman. I wanted this chance to say a couple words of thanks, first to the citizens who came out today, who are on either side of this issue and have different views on it. This hearing, this field trip by a task force with many members of Congress is quite unusual, you usually get one or two or three when we invite members of Congress to come. Many came today. I do not think they thought it was a sham, Mr. Davidson. I think they came to listen. They spent time yesterday afternoon with real people in Lafitte, Louisiana, fishermen, farmers, homeowners, members of the local government there, who told them real stories about their problems with these laws. They were not horror stories, they were real stories, everyday stories. They listened and talked to an awful lot of citizens during that time. And I think we all learned from that meeting.

Today, we heard from a shrimper, farmer, indeed we heard from the Chairman of the Black Bear Conservation Committee and other members now about this issue, and from a forester, a man who owns a timber company and is trying to harvest his land, we heard from a citizen with a problem with wetlands, we heard from a parish official who is having problems with the same issue, we heard from the gentleman who happens to be the national chairman of the National Wetlands Coalition who happens to live right here in this community, someone who indeed should have been invited to testify today, Mr. Davidson. We heard from three of you representing environmental interests in the state. I do not consider these hearings a sham, I am ashamed that anyone would have said that.

More importantly, I want to thank those of you who did come to participate, and I think the task force chair will tell you when we conclude that the hearing remains open for submittals. Those who wanted to testify who want to submit information, who want to challenge any statement made here today by any person who—maybe, Mr. Lloyd, subject to any kind of test. If you want to challenge it, submit information. The task force is interested in learning.

And finally, I want to thank the parish—Plaquemines Parish, Dr. Lloyd Udanos, its president, its members, for allowing us this facility. I hope you notice we did not have this meeting in some fancy building somewhere. We held it out in the country, right close to New Orleans, but nevertheless right out in the country, where indeed we have a sense that most of our problems lie with real people.

And I again want to thank both of our chairmen, Mr. Doolittle on the Wetlands Task Force and Mr. Pombo on the Endangered Species. We are not going to solve these problems easily. And if today has been a chance for all of us to learn something, we appreciate that chance and we hope you appreciated it too.

[Applause.]

Mr. POMBO. I thank the gentleman, I thank the people of Louisiana for having us down, and the record will remain open to receive testimony, and the hearing is adjourned.

[Therefore, the hearing was adjourned; and the material submitted for the record may be found at end of hearings.]

ENDANGERED SPECIES ACT

MONDAY, MARCH 20, 1995

U.S. HOUSE OF REPRESENTATIVES, SPECIAL TASK FORCES
ON ENDANGERED SPECIES AND WETLANDS, COMMITTEE
ON RESOURCES,

Boerne, TX.

The Committee met, pursuant to notice, at 9:00 a.m., at the Kendall County Fairgrounds, Boerne, Texas, the Honorable Richard W. Pombo (Task Force Chairman) presiding.

Members Present: Representatives Pombo, Smith, Bonilla, Stenholm, Thornberry, Cooley, and Chenoweth.

STATEMENT OF THE HON. RICHARD POMBO, A U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. POMBO. The Endangered Species Act Task Force will come to order. The Task Force is meeting today to hear testimony on how the Endangered Species Act affects the State of Texas.

Under Rule 6(f) of Committee Rules, any oral opening statements at hearings are limited to the Chairman and ranking minority member. This will allow us to hear from our witnesses sooner and help members to keep their schedules. Therefore, if other members have statements, they can include them in the hearing record.

I have a prepared statement that I will enter into the record. But we do have a very full list of panels today that we want to hear from, so I will make this brief. The reason that we have organized the Endangered Species Act Task Force was that shortly after January 4, when the new 104th Congress was sworn in, Don Young, the new Chairman of the Resources Committee, decided that there were a number of special legislative issues that the Resources Committee would be dealing with and that needed to be dealt with in a very quick manner—one of those was the Endangered Species Act reauthorization—shortly after which a task force was formed.

I was named Chairman of that Task Force and all of the members were appointed to that Task Force. It was then decided that in order to get away from everything that we had heard inside the beltway of Washington for a number of years, that the best course of action was to take off across the country and have a number of field hearings to listen to the people who have had to live under the Endangered Species Act, with its conflicts in implementations, and to try to listen to what some of the problems have been, what some of the possible solutions will be, and how best to proceed with reforming the Act so that it was truly an Act which would work in the real world.

Therefore, we decided to go out into the real world and one of the places that we came to was southern Texas. We are very interested in hearing the comments of the panels that are here today, but also the comments of everyone else who lives in this area. Therefore, the official record of the Task Force will remain open for a period of ten days so that any written testimony that any of you wants to contribute to this will be treated the same as the oral testimony that we will receive, and all that testimony will be put into the official record of this Task Force and considered at the time that we rewrite the bill.

Having said that, I would like to turn to the ranking member of this panel here this morning, Mr. Charlie Stenholm, who is from a little north of here.

**STATEMENT OF HON. CHARLES STENHOLM, A U.S.
REPRESENTATIVE FROM TEXAS**

Mr. STENHOLM. Thank you very much, Mr. Chairman. Let me, too, add my words of welcome to you and thank you for bringing your Task Force to Texas. Where I come from, we believe very strongly in the old adage "If it ain't broke, don't fix it." The Endangered Species Act of 1973 is broken. It needs fixing.

I look forward to rolling up my sleeves, working with you and other members of this Task Force, look forward to hearing from the witnesses today, as we look for some of those solutions for how to fix it.

Thank you again for being here and I look forward to listening to the witnesses today and learning a little bit more about this Act and how we can fix it.

Mr. POMBO. Thank you. I would like to turn to Henry Bonilla, Congressman Henry Bonilla, for a brief opening comment.

**STATEMENT OF HON. HENRY BONILLA, A U.S.
REPRESENTATIVE FROM TEXAS**

Mr. BONILLA. Thank you, Mr. Chairman. It's truly remarkable that we are able to have this hearing here today. In all the 29 counties I represent throughout south Texas and west Texas, the Endangered Species Act is the greatest threat that supersedes anything else in my Congressional district.

[Applause.]

Mr. BONILLA. From the very beginning, those of you who represent each group here today have been wonderful about coming up to me every time I visit your home towns and letting me know yet another aspect of how much it has hurt. In San Antonio, as well, we have the Endangered Species Act, where some radical left wing groups have used it to the point where they have said that they don't care whether we have to shut down all of our military installations.

So it spans farms, ranches, small businesses, homes, the economies of all 29 counties that I represent. When I went to Washington the very first time, I sought out people like Congressman Pombo and those who are on this panel, my friend Lamar Smith, who was on this issue well before I ever even thought about running for Congress, and those of us who are all committed to pushing for property rights reforms in Washington.

This hearing is only the beginning. I ask you to continue. We have opportunity this year to reform the Endangered Species Act, but I ask you to continue beating the drums out in the communities because the ballgame is far from over. This is only the beginning. This hearing today is a starting point for all of us to gather information from the heartland instead of listening to those bureaucracies within the Washington beltway and within that rat's nest in Austin that sends bureaucrats——

[Applause.]

Mr. BONILLA.—that sends bureaucrats out onto your property thinking that they know better how to run it than you do, and that's what we're up against today.

I'm proud to have 50 cosponsors on my Endangered Species moratorium bill that we're trying to push through the House of Representatives now. We're going to get more. We have a real opportunity this year and I thank you so much for being part of this historic even in Boerne today.

[Applause.]

Mr. POMBO. And, also, to Congressman Lamar Smith.

STATEMENT OF HON. LAMAR SMITH, A U.S. REPRESENTATIVE FROM TEXAS

Mr. SMITH. Mr. Chairman, I thank you. On behalf of my hardworking, taxpaying, property-owning constituents, many of whom are here today, I welcome the Endangered Species Task Force and the Committee on Resources to Boerne, Texas, to the heart of the 21st District.

The people of our district and the people across the United States are simply fed up with government regulations which destroy their constitutionally protected rights by taking their property. Across our nation, hardworking citizens are denied the productive use of their private property. Regulations that prohibit individuals from productively using private property or require landowners to jump through complicated hoops to use their own land as they see fit have become commonplace.

Officials of the Department of Interior have casually violated the rights of hardworking, taxpaying American families for the sake of blind cave spiders, fairy shrimp, and golden-cheeked warblers. Just imagine if the Endangered Species Act had been around throughout history. In the Bible, Noah could have been condemned as an animal hater, fined and kept from launching his ark, George Washington could have been imprisoned for cutting down the cherry tree, and Lewis and Clark could have been fined for trampling native grasses.

What's worse, many of the most oppressive regulations were never authorized by Congress. Congress intended the Endangered Species Act to balance the rights of citizens to use private property with protection of the environment. Rogue government agents have ignored these clear requirements, flouting Congress' clear intentions.

Employees at the Department of Interior have turned the need to balance private property rights and protect natural resources into a heavy-handed, big government scheme that violates constitutional rights without protecting the environment. Working under

the leadership of Richard Pombo—and I appreciate his holding this hearing in Texas, in the district, and in the presence of so many of colleagues here, and, working with them, we will put some balance and common sense back into the Endangered Species Act.

As Charlie Stenholm said a while ago, it's broken, we simply need to fix it. I'm pleased to have helped this process by introducing legislation and then seeing passed just the week before last the moratorium on the new listings under the Endangered Species Act. I'm also pleased to be an original cosponsor of the Private Property Protection Act of 1995.

[Applause.]

Mr. SMITH. Mr. Chairman, the 104th Congress will do everything in its power to make sense of the Endangered Species Act and I'm glad that the Committee has selected our district to start this process.

[The opening statement of Hon. Lamar Smith follows:]

STATEMENT OF HON. LAMAR SMITH, A U.S. REPRESENTATIVE FROM TEXAS

I am pleased to welcome the Endangered Species Task Force of the Committee on Resources to Boerne, Texas, the heart of the 21st district, to discuss two of the most important and controversial issues facing our Country today: the importance of private property and the need to preserve our natural heritage. We're privileged to have some of America's most beautiful country and bountiful resources here. The people of our district are committed to preserving this natural heritage. And we're also strong believers in the sanctity of private property as enshrined in the Fifth Amendment to the United States Constitution. Our heritage of liberty and freedom is equally important to us. Working with this Committee and a new Congress, we are confident that we can turn the Endangered Species Act, and all of our environmental legislation, into common-sense, effective laws that accomplish both goals.

The people of our district, and the people across the United States, are fed up with governmental regulations which destroy their Constitutionally protected rights by taking their property. Today, a flood of rules, mandates, and regulations from Congress, the Environmental Protection Agency, Department of the Interior, and Fish and Wildlife Service and other bureaucracies threaten to extinguish the flames of liberty that has made America the freest, richest, and most conservationally aware nation in the history of the world.

Across our nation, hard working citizens are denied the productive use of their private property. Regulations that prohibit individuals from productively using private property, or require landowners to jump through complicated hoops to use their own land as they see fit, have become commonplace. Small business owners, family farmers, and small landowners suffer today under a regulatory regime that makes public servants the capricious masters of the American people.

As it is currently implemented, the Endangered Species Act contains governmental regulations which are among the most burdensome. Officials at the Department of the Interior have casually violated the rights of hard-working, tax-paying American Families for the sake of blind cave spiders, fairy shrimp, and golden-cheeked warblers. The following horror stories are not exceptions; they are the Rule:

Landowners in 33 Texas counties are endangered because their land may be designated as "critical habitat" for the golden-cheeked warbler. This designation could render vast amounts of property useless and valueless.

In Montana, a rancher was fined \$3,000 for violating the Endangered Species Act. His crime? He shot and killed a grizzly bear that charged him on his own property.

In Round Rock, Texas, a school could not be expanded because Federal agents discovered a blind cave spider nearby. Government officials forced this delay after the school district had spent almost \$100,000 of taxpayer money. We don't have a dollar to waste on education, let alone for a blind cave spider.

Just imagine if the Endangered Species Act had been around throughout history. In the Bible, Noah could have been condemned as an animal-hater, fined, and kept from launching his ark. American history could have been changed forever: George Washington could have been imprisoned for cutting down the cherry tree. Lewis and Clark could have been fined for trampling native grasses.

What's worse, many of the most oppressive regulations were never authorized by Congress. Congress intended the Endangered Species Act to balance the rights of citizens to use private property and consideration of economic impacts with protection of the environment. These requirements were written into the Endangered Species Act and are reflected in the substantive provisions and procedural requirements contained in the Act. We also explicitly required the Fish and Wildlife Service to make a designation of critical habitat before regulations could be implemented under the statute. Rogue government agents have ignored these clear requirements, flouting Congress' clear intentions. Government officials have expansively interpreted their legal authority, with little respect for the law and shallow concern for the Constitution.

In addition, the Fish and Wildlife Service's illegal interpretation of the Endangered Species Act has not protected our natural heritage. Heavy government regulations have not caused Americans to conserve natural resources. This system has instead produced disincentives for stewardship and conservation and positive incentives for landowners to discourage the location of environmentally positive species or plants on their property.

In short, employees at the Department of the Interior have turned a carefully calibrated balance of both needs of people with the need to conserve and protect natural resources into a heavy-handed, big government scheme that violates Constitutional rights without protecting the environment. Prior Congresses acquiesced to this bureaucratic nightmare, but the 104th Congress will stand tall.

Working under the leadership of Chairmen Young and Pombo, we'll put some balance and common sense into the Endangered Species Act. And we'll make sure the bureaucrats at the Department of the Interior follow the law. I'm pleased to have helped begin this process by successfully offering an amendment to the recently passed Regulatory Transition Act to extend the regulatory moratorium on new listings under the ESA until Congress reauthorizes the Act or until the end of this Congress. I'm also pleased to be an original co-sponsor of the Private Property Protection Act of 1995 and the author of the Private Property Litigation Relief Act of 1995. The 104th Congress will make sense out of the Endangered Species Act, and I'm gratified that the Committee has selected our district to start this process.

[Submissions of Mr. Smith may be found at end of hearing.]

Mr. POMBO. Thank you. I would like to also introduce the other Members of the panel. Mac Thornberry is a new Member from north of here, also. Wes Cooley is a Member from eastern Oregon, a cattle rancher from that area. Helen Chenoweth is a resource manager from Idaho, who is also a new Member of Congress. They are also on the Task Force with me.

[The statement of Mr. Thornberry follows:]

STATEMENT OF HON. WILLIAM M. "MAC" THORNBERRY, A U.S. REPRESENTATIVE FROM TEXAS

I would like to thank everybody for being here today. I think we have a golden opportunity, or perhaps a golden-cheeked opportunity, to take an in depth look at the Endangered Species Act. Since the ESA was signed into law in 1966, the Fish and Wildlife Service (FWS) and the Federal courts have expanded the law in ways never intended by its crafters. Our hearings in Texas, Louisiana, and other communities will provide us the common sense ammunition we will need to win the reauthorization battle in Washington, D.C.

In my district in the Texas panhandle, the FWS is considering designating the Arkansas River shiner as threatened or endangered, an action that would place the livelihood of many of my constituents in serious jeopardy. While the FWS maintains that shiner designation would pose no threat to the local economy, we need only look to the central Texas Edwards Aquifer and Golden-Cheeked Warbler controversies. There the FWS was sued by outside interests groups for not adequately protecting a species. The FWS practically sought the lawsuit and eagerly awaited a judgment ordering that it step up their restrictions upon private property owners. In considering the shiner, the FWS indicated an interest in restricting pumping of underground water from the Ogallala Aquifer. In an area so heavily dependent upon crops irrigated by underground water sources, this could mean disaster.

The situation here in central Texas, the Big Country district of Mr. Stenholm, Chairman Pombo's Golden State of California, Mr. Cooley's beautiful Pacific Northwest State of Oregon, Mrs. Chenoweth's great Forests of Idaho, and in my High Plains district clearly demonstrate the need to rewrite the ESA. We must base the

ESA on sound science—not emotional appeal. And we must take into consideration the cost and economic impact of a listing—not force individual landowners to pay the tab on their own.

The best means of protecting species and the environment is private property ownership. When people own a resource, they work to protect it because their own best interests are at stake. I am afraid that if we lose the pride associated with private property ownership, we will begin to see the unthreading of our society and this Great nation and the unintended degradation of our resources.

Mr. POMBO. I would like to introduce our first witness and call him up to the stage up here. I'll turn to Congressman Lamar Smith to do the formal introduction.

Mr. SMITH. Would Rick Perry please come forward? He is our first witness today. Here he is.

[Applause.]

Mr. SMITH. Mr. Chairman, it is a pleasure to introduce our Texas Agriculture Commissioner to everyone here today, though I think everyone is very familiar with the good work that Rick Perry has done. Rick Perry was first elected our Chief of Agriculture in 1990. He was reelected in 1994. Prior to that, he served in the Texas Legislature from 1984 to 1991, and, while he was in the Texas House, he was named one of the ten most effective members of the legislature.

Rick, like you, I come from a farm and ranch background and it's because of your background as a farmer and rancher that you understand the absolute necessity, the vital concern and the absolute demand upon all of us, and you included, to do everything we can to support the rights of private property owners.

Rick, you know and I know and everyone on this panel knows that the absolute best environmentalists, the best stewards of the land are the farmers and ranches themselves.

So, Rick, it's especially nice to have you with us here today. We appreciate your presence, we appreciate your expertise, and we appreciate especially your advocacy of private property rights.

STATEMENT OF THE HONORABLE RICK PERRY, STATE AGRICULTURAL COMMISSIONER, AUSTIN, TEXAS

Mr. PERRY. Lamar, thank you very much. Chairman Pombo, welcome to Texas. It is a large place. The folks down in Brownsville might be just a little bit taken aback that you call this south Texas, and Charlie is a little bit north of here. And Mac would be a little bit offended that you say he's a little bit north of here. But we love this state and as you can see today by the crowd that's here, the men and the women, as Lamar very aptly recognized them, are hardworking, taxpaying citizens of the State of Texas.

We want to say thank you. Thank you for coming to Texas. Thank you for coming to a state that probably has been impacted as much as any state in the Nation by this Endangered Species Act and by those groups across the state that have been using that Act as a tool, a tool against those people, trying to take away their right to make a living. That's what this is really all about.

Before I get into my testimony, I want to read a letter from a friend of mine, who could not be here today, but asked me to read into the record his letter. It says: "Dear Distinguished Members, I am pleased that you have chosen Texas for your first field hearings on reauthorization of the Endangered Species Act. More than 95

percent of Texas lands are privately owned and many Texas landowners have been directly affected by the Endangered Species Act and its implementation by the United States Fish and Wildlife Service.

"Texas is home to more than 70 federally-listed endangered species and several more are proposed to be listed as endangered. Texans know best how to protect our environment and conserve our own natural resources. The heavy-handed approach of the U.S. Fish and Wildlife Service in implementing the Endangered Species Act has only served to strengthen that belief.

"The method by which the Act is currently implemented in Texas has the opposite effect on what Congress intended when it enacted the Endangered Species Act in 1973. Instead of protecting rare and endangered species, it actually provides incentives for landowners to rid their land of any signs of these species for fear of enforcement actions from the U.S. Fish and Wildlife Service. The Endangered Species Act must be revised to provide incentives for private landowners to promote and serve the species we want to protect.

"The state should be given the authority and the flexibility to decide the best approach for protecting the unique resources within their borders. Government must capitalize on the positive relationship between good environmental policy and good economic policy. The Endangered Species Act must be revised to require that economics and social concerns be incorporated into the listing process.

"Species should be listed only if sufficient, sound, scientific information supports the listing, and only if the economic and social costs are not too high. The Endangered Species Act must be carefully enacted"—

[Applause.]

Mr. PERRY.[continuing] "and administered to minimize the potential impact on private property rights and private property must never be taken by government regulation without just compensation to the property owner."

[Applause.]

Mr. PERRY. "The Endangered Species Act must be revised to incorporate common sense and balance. People must be included in the equation. The Texas experience with the Federal Endangered Species Act is broad and varied and, I believe, worth hearing. Thank you for coming to Texas to hear what our citizens have to say. Sincerely, George W. Bush," Governor of the great State of Texas.

[Applause.]

Mr. PERRY. Mr. Chairman, I added that "great State of Texas," but it is a great and wonderful place. We do have a few distractions, as Congressman Bonilla talked about, that rat's nest in Austin. Well, I live there and after November the 8th, we turned a few cats loose to try to clean up that rat's nest.

And what's important is that we do have people in Austin, Texas today that are committed to the private property rights of Texans, that truly believe that we can take care of the endangered species that are there, and that these men and women can still make a living as they do their work. And George W. Bush is one of those individuals. And I'm proud today to come to not only represent him,

but to represent the men and women of Texas agriculture and this great state.

We do know firsthand the serious problems with the Endangered Species Act and I am certainly pleased to have the opportunity to be in front of you for these short minutes to share with you why we think and feel passionately that the reauthorization of this Act has to go forward and that we have to have a reauthorization that's done.

One of the big problems that we've heard is this "don't worry" rhetoric that comes from the U.S. Fish and Wildlife Service. We hear it time and time again. Another problem with Secretary Babbitt's plan is that it will exempt landowners with five acres or less from complying with the Act. That may quiet a few of the suburbanites in the surrounding areas around Austin or San Antonio, but the real problem are those landowners, those ranchers, those men and women that are out there working the land, the people that, because of the work that they have done, we have those species today. Those are the folks that I think that we really need to listen to.

I had the opportunity to testify in front of the U.S. Senate the week before last, Fisheries and Public Works Subcommittee, before Senator Hutchinson, where she had her six-month moratorium in front of that group. It has passed, subsequently added on to another bill. We have to say "here, here" to Senator Hutchinson and the work that she has done on the moratorium and obviously to put the pressure on to see the reauthorization of the Endangered Species Act done.

I could go on and on with stories. I know that there are people out here that are going to share with you those personal instances when their rights, previous rights that men and women across Texas literally have given their lives for in the past, are being taken away one by one by bureaucrats in Washington, D.C. that have never stepped foot on a farm or a ranch in their life, that don't know what it's like, as some of you certainly do, to lose a crop to mother nature. We understand that, and we'll live with that, but to lose our livelihoods because of some bureaucrat in Washington, D.C. or Austin, Texas is not right, it's not good, and I think you will hear from these people today that they share with you a common sense approach, that we can, in fact, put common sense into a piece of legislation, that we can, in fact, have a Department of Interior that listens, because that's what we demand.

We demand that as citizens of this state and of this country. And we say thank you for coming, thank you for listening to people that can show you how to fix a bill that, as Charlie said, is broken.

Thank you very much.

[Applause.]

[The prepared statement of the Honorable Rick Perry may be found at end of hearing.]

Mr. POMBO. Commissioner Perry, I'd like to thank you for being here to testify before the Committee. I know that in your tenure in office, that you have worked toward some very inventive and some very new ways of finding solutions to these problems that we're faced with. And I would like to encourage you to include all of those ideas in the record so that when we actually do sit down

and write the bill that is going to reform the Endangered Species Act, that we can pull from some of those ideas that have come out of Texas. I thank you very much for coming.

I'd like to, at this point, recognize Mr. Stenholm, if he does have any questions of this witness.

Mr. STENHOLM. No questions. I'm just glad to see my neighbor here this morning.

Mr. POMBO. Thank you. Does any other member of the Committee have any questions at this point?

Mr. COOLEY. No questions.

Mr. POMBO. Seeing none, thank you very much. I would like to invite our next panel of witnesses to be seated. This panel consists of the Mayor of San Antonio, Nelson Wolff; Bob Stallman; Pieter Schenkkan; and, Danny McFadin.

Thank you. I would like to remind the witnesses that their entire statements will be included in the record; that we are limiting their oral testimony to five minutes. I would like to request that they stay within the five-minute rule, as we do have a very full schedule today. The question period for the members of the Task Force will also be limited to five minutes. I would like to start with Mr. Mayor.

STATEMENT OF THE HONORABLE NELSON WOLFF, MAYOR, CITY OF SAN ANTONIO, TEXAS

Mr. WOLFF. First of all, let me welcome you, also, to the Hill Country and to the San Antonio area. We're delighted that you're here, delighted that you're taking a direct interest in this Act.

San Antonio became very well acquainted with the Endangered Species Act in May of 1991, when the Sierra Club filed a lawsuit against the Fish and Wildlife, stating that there were endangered species at Comal Springs, that they needed to protect. That suit went forward, led to an order by the judge in January of 1993 that said that the city of San Antonio and the surrounding pumpers must cut back some 60 percent on our use of the aquifer. That translates into about 270,000 acre feet of water that would have to be developed somewhere else, at a cost some four billion dollars, posing much, much greater damage to the environment and the springs, which only went dry in Comal in the 1950's and is about a two to three hundred year timeframe on a drought that would dry up those springs.

The Fountain Darter, which is located in those springs, are also in San Marcos Springs, which have never gone dry. So what we find ourselves with today in this fight over the Endangered Species Act is one that is becoming very, very detrimental to our community in terms of our ability to attract business, in terms of our ability to maintain the military missions here in San Antonio.

On June 21, 1994, the Fish and Wildlife began a consultation process, an informal consultation process, which does not take court authority to do. That process led to the fact that every one of our bases in San Antonio are red-lined because of the water issue related to the Endangered Species Act, and, quite frankly, it's a legal issue and a governmental issue rather than a water issue.

This is a five-page letter that was sent to Randolph Air Force Base by the Fish and Wildlife that states tremendous obstacles for

any mission to be located here in San Antonio, let alone trying to preserve the ones that we have today. A five-page letter. If you were the head of that Randolph Air Force Base or any defense installation, you'd probably say the heck with it, we'd go somewhere else. That's why our bases are red-lined today. That's part of the reason why Brooks Air Force Base is recommended for closure, why Kelly Air Force Base is on the list for potential closure, and why a number of jobs have already been lost within the bases that are here in San Antonio.

The Fish and Wildlife also just recently came along on March 14 and said that a Federal Judge has the right to do whatever he needs to do to protect the endangered species. You've given up the governmental right of an agency to participate and have given it over to the court system. That court has ruled on March 6 of this year that an emergency plan has to be put in place by the end of this month.

With the consultation, with the judge's orders, with the unreasonable interpretation of this, with the same folks that brought the lawsuit, the Sierra Club, at the same time that they brought the lawsuit, fought the ability of this community to develop a reservoir to supplement our use of the water and were successful in that fight and defeated the reservoir.

It is very clear what their agenda is, clear as clear can be—stop this community from growing, this community that's a relatively poor community, this community that has the largest percent of minorities in it. Stick an economic dagger right in the heart of San Antonio, Texas and shut it down. That's the effect of this Act and it's having a tremendous effect on us right now just with our military bases.

I urge you to amend this Act, to take into consideration that each one of us sitting in this room is a species, also; that, as a species, we have a right to gain a living, to provide an income for our families, to provide for our children. As much as any other species around the United States, we are indeed at threat rather than some of the ones that are being used today as a way to really settle a water fight.

[Applause.]

Mr. WOLFF. And we appreciate the fact that an act was passed to reimburse private property owners for the taking. Under the Endangered Species Act, we've got the city of San Antonio and over a million people in it that could be affected up to four billion dollars in terms of developing other water resources.

We have tried to be extremely on top of environmental issues. I don't think there's a city council anywhere in the State of Texas that has been as strong as we have in putting in protection measures over the aquifer and buying 4,800 acres of land to set aside for endangered species and recharge.

We ask you to let local people decide these issues. We support that in the legislation and we support a regional management plan, but we don't support the Federal Government and the Federal bureaucrats telling us how to manage our water and how to protect our environment.

Thank you.

[Applause.]

[The prepared statement of the Honorable Nelson Wolff may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Bob Stallman. And, please, speak right into the microphone, the big black one there, so people in the back can hear you. Thank you.

STATEMENT OF BOB STALLMAN, PRESIDENT, TEXAS FARM BUREAU, WACO, TEXAS

Mr. STALLMAN. Mr. Chairman, members of the Task Force, my name is Bob Stallman and I am President of the Texas Farm Bureau and also a rice producer. You will undoubtedly hear from many individuals who have been directly impacted by the Endangered Species Act here today. It is my pleasure to address you from the vantage point of an organization that has been significantly impacted by this law.

In 1991, in *Sierra Club v. Babbitt*, the Endangered Species Act was used as a weapon to try to take property rights—in this instance, water—from private landowners. In the protection of our members' interests, the Texas Farm Bureau became involved in this case. We have invested thousands of dollars of our membership dues in an attempt to protect a sacred property right in Texas, known as a rule of capture.

To this day, there has been no satisfactory resolution to this lawsuit. However, under the threat of Federal intervention, the state legislature has taken individuals' property rights by restricting their right to pump water from beneath their own land.

In my testimony today, I will specifically address some of the primary concerns we have with the Act. I have also submitted a detailed list of recommended changes that I would like to ask to be included in the record.

I will begin with the listing process. Under current law, any interested person may petition the Secretary of Interior for the listing of a species. In fact, information gathered by the Natural Resources Foundation of Texas shows that over 20 of the last petitions were submitted by student groups. These listings were, in general, void of any substantive scientific information. Yet, by law, the Secretary is required to proceed through the full listing process.

It would appear that many listings occur based on alleged habitat modification or destruction. For instance, the Golden-Cheeked Warbler was listed due to the loss of habitat in the urban San Antonio-Austin corridor development. This occurred even though millions of acres of breeding and nesting habitat continued to exist in the rural areas of central and west Texas. The listing not only affected urban development, but jeopardized normal cropping operations on hundreds of farms and ranches.

Listings have also occurred through isolated populations that may be plentiful in other areas of the country. Specifically, the Arkansas River Shiner, found in the Texas Panhandle, is also found in the States of New Mexico and Oklahoma. This situation is similar to that in the Edwards Aquifer, where four endangered species are found in the Comal and/or the San Marcos Springs, but do exist in other areas.

The Act purports to provide some relief to landowners who have a need to modify a habitat through the use of a Section 10(a) per-

mit. These permits allow for an incidental take of a species and we understand that approximately 22,000 have previously been issued. To our knowledge, none have been issued to individual private property owners. They have all gone to either government agencies or large corporations. For all practical purposes, this availability is not for farmers and ranchers.

Finally, the Act provides no incentives for landowners who may have listed species on their land. A voluntary program is needed that gives incentives to property owners to manage listed species. A carefully crafted incentive program that provides real incentives would do more for species recovery than anything that is currently in place.

Mr. Chairman, you are obviously aware of the many court challenges to the enforcement of the Endangered Species Act. In our opinion, one culprit is the insertion of the word "harm" in the definition of "take" in the law. We feel that administrators have distorted this definition far beyond the scope of the law. This definition, along with the requirements of Section 5 of the Act, would seem to be a prescription for total land use control by the Federal Government.

At the top of our priority list of required changes to the Act is the compensation for any takings of private property to protect species. Society must be willing to compensate property owners for government actions which restrict uses of property which do no harm to one's neighbors. While we hope for favorable decisions in current Endangered Species Act litigation, we feel it is your role to make such litigation unnecessary.

In closing, I would just like to add that of the many people you see here today, many are farmers and ranchers and have, I know personally, come a great distance at a time, in the spring in this state, where there is much work to be done on farms and ranches, and they are here for one reason. They are here because they're tired of being bullied, harassed and threatened by a government agency that shows little concern for the fact that—

[Applause.]

Mr. STALLMAN. For a government agency that shows little concern for the fact that farmers and ranchers love the land, they live on the land, and they make their living from the land.

Mr. Chairman and members of the Task Force, I can't tell you how much we really appreciate you being here in Texas to hear our concerns today. Thank you.

[Applause.]

[The Farm Bureau Amendments may be found at end of hearing.]

Mr. POMBO. Thank you. Next, Mr. Danny McFadin, who, I've been reminded, is a constituent of Mr. Bonilla's. You may proceed.

STATEMENT OF DANNY McFADIN, KNIPPA, TEXAS

Mr. McFADIN. Thank you. I'm proud to be a constituent of Representative Bonilla's. He's doing us a whale of a good job.

[Applause.]

Mr. McFADIN. I am Danny McFadin and I'm from Uvalde County. I am currently involved in an Endangered Species lawsuit styled as *Sierra Club v. Bruce Babbitt*, Department of the Interior

and Danny McFadin, et al. I am involved because I am a fourth generation rancher and farmer, and I pump water from the Edwards Aquifer is the reason I'm really involved.

For many years, there's been a lot of factions trying to come out and control our water and they felt like they finally stumbled onto the Endangered Species Act as a way of maybe finally controlling the groundwater and undergroundwater in the State of Texas.

If undergroundwater in Texas is allowed to be controlled through the Endangered Species Act, then I feel like all of the privately owned land in the State of Texas is in jeopardy by whoever controls the water, and I think that's really what the whole thing is about.

[Applause.]

Mr. MCFADIN. I pump water from the aquifer and I'm about 120 miles from the springs where the endangered species are located. It has been proven by professional hydrologists that there are barriers in the aquifer that keep my water levels about 150 foot higher than the springs level, but I've been told by our former Governor Briscoe that you don't want to confuse those people with facts down there in Austin.

So it just has never been proven that we're really affecting the springs. However, the Endangered Species Act has been successfully used, through the Sierra Club case, to scare the Texas Legislature into passage of a bill that takes away my rights to pump water from the aquifer, and it's all dependent on the spring flow for the survival of the species. It also stops any new wells from being drilled in the aquifer.

I personally have purchased a dry-land farm and bought a drilling rig of my own to develop it into an irrigating farm. We live out in a semi-arid area which receives about 22 inches of rainfall and I bought this property depending on developing it into irrigation, and they have stopped me from that.

The Endangered Species Act, I think, is being used beyond its purpose to successfully take away the right for me to develop my land. It has reduced the value of my property, which I think at one time was 1,000 dollars down to 500, costing me in excess of 100,000 dollars. The Act will probably be used to stop pumping of any agricultural purpose in our five-county area and it will finally filter out into the rest of the State of Texas.

This will complete devastate at least two counties in our area whose sole income is from irrigated agriculture. I don't think the Endangered Species Act was fully intended to do this and be as broad as it is, to break the backbone of agriculture and put thousands of people out of work. The recent Sierra Club case is going to have a hearing this summer, that probably, I think, is going to be in May, that is going to determine—the court thinks he's going to determine whether he's going to regulate pumping from the aquifer and not. And I understand you can't do a darned thing with a Federal Judge.

It's just gotten plum out of hand. If the degradation of private—

[Applause.]

Mr. MCFADIN. If the degradation of private property is allowed to continue through these kinds of laws and acts, then I think America will become a third-world country in our own lifetime.

As far as compensation, these people in agriculture don't want to be compensated for their land. They want to be left alone. They want to make a living on it. That's all they know how to do.

[Applause.]

Mr. MCFADIN. They bought and paid for their land and they worked dern hard for it. They don't work wee hours into the night trying to harvest a crop to get a hay crop out before a little rain or they don't spend half the night in the kidding barn trying to keep a bunch of Angor kids from freezing to death in below freezing weather, to have somebody they've never heard of write a letter and send it to some law official that they don't even know, telling them they're endangering some species.

They probably never heard of them and can't even begin to spell the name and they've totally got to quit doing all these fun things they've been doing with their agriculture land or they're liable to be in jail by nightfall. Folks, that's wrong. And the people in Washington who allow this sort of thing to happen have no idea what this country is based on. It is based on private property ownership and it's based on a free nation.

And what's happening with the Endangered Species Act is totally wrong. The Endangered Species Act—

[Applause.]

Mr. MCFADIN.[continuing] is the most dangerous piece of legislation that I feel like has ever been passed for our country and it needs to be done away with. We're asking you to go back to Washington and stand tall and be counted and support the people that are supporting you and correct the wrongs that are being done to us. We'll be there when you need us and we want you to be there so we can count on you all.

We're proud to have you come to Texas, and I know we're speaking to the wrong people, but we're happy for you to be here. I'll be happy to respond to any questions.

[Applause.]

Mr. POMBO. Thank you and I thank all the panel members for their testimony. Mayor Wolff, you pointed out in your opening testimony that the Fountain Darter's numbers can be increased through a captive breeding program. Has the Fish and Wildlife Service been receptive to that idea?

Mr. WOLFF. No. In fact, what happened during the 1950's, there was a drought of record. The Comal Springs dried up for five or six months, I think. At that time, they had the same species in the San Marcos Springs, which has never dried up and could be preserved there.

The drought that happened in the '50's, based on our knowledge and based on the Texas Water Commission at that time, it's about a once in two or three hundred time that that would happen. So, no, they have not been receptive to taking it somewhere.

Really, they're using the Endangered Species Act in a good old water fight. We've got a good old water fight down here. The farmers want their water, we want some water, the springs want some water, and the down river from the springs also wants some water, and we're willing and want to work to get a good management plan, but not to be driven by an act that has really nothing to do

with what we're fighting about over here. We'll work out our differences down here. They can just get out of the way.

[Applause.]

Mr. POMBO. Being from California, I know a little bit about water fights.

Mr. WOLFF. Yes, you do.

Mr. POMBO. Mr. Stallman, I understand that, from my reading of some of the issues down here, having what they call a bird ladder can add as much as 25 percent to the property's value. In other words, there's a premium for the absence of an endangered species on your property.

In your opinion, how is that affecting the endangered species as they exist on private property today?

Mr. STALLMAN. Well, it's certainly a disincentive for landowners to want to provide habitat, who want to encourage colonization of species. Any person or any businessman or any landowner is not going to want to go out and do something that automatically reduces the value of his property, and that's why we fully support a voluntary incentive-based approach, where a landowner can do these things without fear of having his property regulated to the point where it loses that value.

Mr. POMBO. Are there currently plans that are being put together in these habitat areas where people—ranchers—can manage their property in such a way that is good for the endangered species, but allows them to continue ranching their property?

Mr. STALLMAN. I know of none based on our own members, because that regulatory concern overlays everything. They are not going to want to work actively and openly to promote to propagate a species as long as there is that threat of future government intervention and regulation of the use of that land.

Mr. POMBO. So do you believe that if we removed that disincentive that exists today, that we could work in a more cooperative manner with the property owners so that both the species and the private property owners benefit from that?

Mr. STALLMAN. Yes, sir. I certainly believe that. If you look at the example of what has been accomplished through the Soil Conservation Program over the past 50-some-odd years, with the program based on education, incentives, some cost help to implement practices, if you put that same type of approach in place for endangered species habitat, you would see a lot more results that we've seen so far with the Endangered Species Act.

Mr. POMBO. Thank you.

[Applause.]

Mr. POMBO. Mr. McFadin, what do you think about what changes can we make to the Act that would protect private property owners like yourself at the same time that we are taking away that disincentive that Mr. Stallman talked about?

Mr. MCFADIN. I really think the endangered species ought to be treated just like anything else in America. It ought to be a free enterprise system. If a farmer/rancher has some habitat area that he feels like maybe there's a species, if they come and tell him, as long as he doesn't have a threat over him, you ought to pay the man. Contract with him to grow the habitat or to take care of the species. There's a lot of people that would be willing to do something

like that, just like they're willing to go out and buy a different bunch of sheep to upgrade their herd.

They ought to be given the chance to be paid to do that. I think the Endangered Species Act might have succeeded if it had done something like that instead of trying to just cram it down their throats and take their property away from them.

[Applause.]

Mr. POMBO. Thank you. My time is about ready to expire. So I will, at this time, recognize Mr. Stenholm.

Mr. STENHOLM. Thank you. Any one of the three of you. And, Mr. Wolff, you mentioned in your statement and in answer to the question of the Chairman a moment ago. The question I would like to ask is regarding the Darter, the minnow or whatever we call it—Fountain Darter.

Having had an experience out in my district several years ago regarding the Concho water snake, in which conventional wisdom said to most of us, who pride ourselves in common sense, would say if you build a lake, you will have more water snakes. But that was never, ever considered by anyone in the frustration.

If I understood, Mr. Wolff, your answer to the Chairman's question, that even though it has been proven that you can raise this particular species and you can, in fact, preserve it in perpetuity, they have not been receptive to that regarding the lawsuits, et cetera, that are present in this area.

Mr. WOLFF. That's correct. The Fountain Darter was reintroduced into the Comal Springs after the drought of the 1950's. There's plenty of other habitat for them. There's no doubt about that. It's as clear as can be. They will not consider that as a solution to this lawsuit.

Mr. MCFADIN. Can I answer that, Charlie?

Mr. STENHOLM. Yes.

Mr. MCFADIN. They don't want to move those Darters anywhere. They'd probably live up there in Wayne Wyatts' country. But they can't control the groundwater if they get rid of those darters. They don't give a flip about those Fountain Darters.

[Applause.]

Mr. MCFADIN. They've got those Darters in the springs and so they just use them to control private property. That's all it is. It's just a socialistic movement to take over private property. They don't give a damn about them.

[Applause.]

Mr. STENHOLM. I thank you. I have no other questions.

[Laughter.]

Mr. POMBO. Mr. Cooley.

Mr. COOLEY. Mayor Wolff, I'm very curious because as you know, the 2nd District of Oregon has been going through this similar thing that the State of Texas now is going through. We're 73,000 square miles, pretty good size piece of land up there, and we're going through the same frustrations in our small communities.

And we've been looking into areas and I'd like to know if you've been looking into like—who provided the funds to the Sierra Club? Did you try to look back on that and say is this local interference or is this really outside interference?

Mr. WOLFF. I can tell you who provided the funds to the Sierra Club. The Guadalupe Banco River Authority provided over two million dollars in financing funds for the Sierra Club, because obviously it's to their advantage to restrict us in our water use. They'll get more water down the line. So the Sierra Club is really—they're in a lawsuit here that is driven by other things other than endangered species.

Mr. COOLEY. So that it's really outside influence into your local community activities?

Mr. WOLFF. It's the Sierra Club based out of Austin, Texas that is bringing this, not the local Sierra Club in San Antonio. And I'm sure they're linked in with whatever movements that are there. But we do know that there's financial interest driving this and that the Sierra Club is simply being used as a pawn in a water fight.

Mr. COOLEY. Thank you very much. Bob, both being old Farm Bureau people and being involved myself as a Farm Bureau President at one time, I'm understanding your frustrations, as well. We agree that these Federal Judges need to be really looked at, but on the water right issue. As you shut this thing down and they're able to accomplish what they're trying to do, and which is really true, they shut us down, what's going to happen to your communities when you don't have the water? Seriously. What's going to go on out there? Is there any alternative at all?

I mean, they're always recommending if we do this, we have alternatives to bring back these small communities and bring back the value of the land. If they were to succeed in doing what they're proposing to do, what's going to happen to your area? Do you know?

Mr. STALLMAN. When you take an irrigated agricultural area, it depends on that irrigation. When you take away that water, you are taking away a major part of the economy of that rural community that depends on that agricultural production and you'll just see a dying of that community, as we've seen in other areas in the past when certain economic instances occur in agriculture.

It's just like anything else. We talk about rural development and the things that need to be done to enhance our rural areas, our rural towns and cities, and, yet, we're working, on the other hand, to regulate a way that the agricultural economy that those communities depend on.

So it will have a very direct immediate impact, both a reduction in the value of land and reduction of an ability to produce food and fiber.

Mr. COOLEY. We in Oregon have had some of the same problems. As you know, the Endangered Species Act has actually put about 63,000 employees out of work in my district, directly related to this Act, and I hope that we can do something that doesn't affect you as badly as we're going to—basically are.

Mr. McFadin, you couldn't have said it any better. You hit it right on the head. People should be very proud of you. You are absolutely true. They are literally shutting us down. They don't care about the endangered species. It's merely a control situation.

We've seen it in the west. We call it the war on the west. You're now starting to feel it on the private property. As you know, most of the western part of the United States is averaging better than

almost 70 percent of the total land masses owned by the Federal Government. So they've been able to flex the bureaucratic muscle as far as the environmental laws are concerned in our particular areas.

I'm sad to see that now they're starting to get into your private property rights. But maybe between the efforts of the people in the west and now some people here in the northwest or southwest, that we can do something to really put some pressure on. We need help. I think bringing this forth and listening to people in the United States, as we're going to in these meetings, and understanding how much this law—as Representative Stenholm said, it's broken, we need to fix it, and we need to have input from people like yourself that are directly affected by this to show the rest of the people in the United States exactly how bad this law has really affected us personally and economically in our endeavors.

I want to thank you for coming here today and giving us your forthright opinions. Thank you.

Mr. MCFADIN. Thank you. We'll stop them in Texas if you'll help us.

[Applause.]

Mr. POMBO. Thank you. Now, Congresswoman Chenoweth.

Ms. CHENOWETH. Mayor Wolff, I was really taken with your testimony. I was taken with all three of you, gentlemen. Your testimony was so compelling. But, Mayor, I want to address my questions and comments to you. This decision by the Federal Judge Bunton, III, is the real reason why I'm advocating term limits for Federal Judges.

[Applause.]

Ms. CHENOWETH. You know, I'm just shocked that your state legislature would react to a decision like this. I'm just grieved that 1.5 million people will be impacted, and that there will be a dollar impact of four billion dollars plus. And the most egregious thing is that your tax base will be severely limited, Mayor, and you and your City Council will have one heck of a time coming up with the dollars that are needed to run the necessary services for your city.

So I would hope that the Texas Legislature would have the courage to revisit this, because actually what the Texas Legislature did was take the four billion dollar liability onto the State of Texas if somebody wanted to sue for a real taking. It's the budget of the State of Texas that could really be impacted. And although individuals are immune under the Doctrine of Sovereign Immunity, and legislators are immune, nevertheless, the State of Texas is not immune from the takings.

So I hope, for many reasons, that the State of Texas, the legislature, and, of course, your new Governor—I think he'll be a great help—will revisit this. I'm very sorry to see it happen, but I look for better days in the future.

Mr. WOLFF. We'd appreciate your help. We've had two Congressmen, Congressman Minge and Congressman Smith, who I've had the privilege of supporting in their elections, that have done a great job for us and we're continuing to look for their leadership in changing this.

Ms. CHENOWETH. Thank you, sir.

[Applause.]

Mr. POMBO. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman. Mr. Mayor, let me follow up on that, because I think a lot of us and a lot of the attention for the Endangered Species Act has focused primarily on how it affects agriculture. But the fact of the matter is that everybody who lives in the city of San Antonio, even if they never leave the city limits, could really be affected by this.

And if you're talking about a four billion dollar cost to replace the water that you could lose, what effect does something like that have on a city the size of a million people?

Mr. WOLFF. Well, we had a study done by Mr. Perryman, who is a noted economist in the state and really follows things very well. His analysis of it is the Act was, and the Judge's ruling upheld, that we had to replace 270,000 acre feet to begin with. I don't know how in the heck you'd ever do that. But it would cost us something like 100,000 jobs in the city of San Antonio, that has an employment base of maybe about six or 700,000, I guess, in the region. So it's a pretty significant impact on jobs.

You know, there's been a lot of talk today, and rightly so, about property rights. But it's not a battle just about property rights. It's a battle over jobs. It's a battle of the ability of people in urban areas to make a living, also. I think we're the first urban area that has been directly impacted by consultation, directly impacted by red-lining all of our Federal institutions in San Antonio. I don't believe that's happened to another American city.

When it begins to happen to a few others, you may see a few mayors getting up here rather than having to rely completely on the people that are in rural areas saying this Act doesn't work, because it's not working for us.

Mr. THORNBERRY. I think that's a very important point to be made. We are talking about jobs for everybody with this Act. Mr. Stallman, let me move to you. Knowing what faces agriculture these days, in addition to the weather and the government and all the rest, tell me, from your perspective, what does it mean for farmers and ranchers and other folks involved in agriculture? What is at stake in changing this bill?

Mr. STALLMAN. I believe that our viability to maintain a productive agricultural economy in this whole country and industry that provides the cheapest food and fiber in the world to this country is at stake. We've seen what happened in the former Soviet Union with excessive government regulation and involvement in agriculture. The more the government tries to regulate what we do, how we do it, and tell us just precisely what to do with the land when we produce the food and fiber that will have a great impact on the ability that we have to be an efficient agricultural producing country.

We are looking realistically at budget cuts in terms of farm programs and we understand that, but we cannot absorb those cuts and at the same time be placed under greater and greater regulatory burdens and be expected to continue to do what we've done in this country ever since its inception.

Mr. THORNBERRY. One of the points you made was that we need to have incentives which will work better at protecting species rather than a club over the top of the head approach that regu-

lators are using now. Can you explain, perhaps for somebody who is not a landowner, why will incentives get better results at achieving the very goals that these folks are wanting to achieve?

Mr. STALLMAN. It's the old carrot versus stick approach. Farmers and ranchers are very independent people and they resent intrusion by government into their lives. On the other hand, they do love the land, they love wildlife. They are prepared to work on their land and incorporate activities that improve that habitat along with their production activities, as long as there are not any great economic losses that will endanger their ability to continue to produce.

So if there's a particular practice that, say, would cost them X percent of income, that, yes, would enhance habitat, I think they would be willing, on an incentive-based approach, to say, well, if we have some incentive, some cost-sharing to help us implement this practice, even though we realize that it might slightly decrease our income, I think there's a tradeoff there that many would be willing to accept.

Mr. THORBERRY. Mr. McFadin, let me ask you about that, too, because there are some people out there who say that the landowners are just out to take all they can get out of the land and they want to graze it off and use it up completely and that there are no incentives that are going to work to try to protect some of these species.

What is your reaction to that?

Mr. MCFADIN. No, that's not right, Congressman. A rancher or farmer is just like the man in the HEB Food Store. He's got to replenish his stock all the time. He's got to protect his grasses, he's got to clear his places, whenever he has finances available, because what he's selling is what he grows out there. And if you just rape the land, as a lot of people say that the farmer or rancher does, he's going to be out of business right away and won't be able to succeed.

And a farmer or rancher would work with anybody. They were raised that way. They were raised not to depredate on their neighbor and to take care of their neighbor, be friends. And if they were just given some incentive and contract with them to raise a species, but that also needs to be paid by these people that want to save these species instead of by the taxpayers' dollars.

[Applause.]

Mr. THORBERRY. Thank you, Mr. Chairman.

Mr. POMBO. Thank you. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. Nelson, it seems to me that you and the other members of the panel a minute ago were making one important point, and that is that the rights of people are equally important to the rights of insects and fish and grasses and birds, and that's what we need to convince the Federal Government of.

A minute ago, you talked about the economic impact on San Antonio, 100,000 jobs, perhaps four billion dollars in lost property value. The Endangered Species Act is written—actually says we have to consider the economic impact of listing endangered species and the critical habitat.

To your knowledge, has the Federal Government ever considered the economic impact of enforcing the Endangered Species Act?

Mr. WOLFF. No. I don't see evidence of that at all. It's my understanding of the Act that you have to base this on biological and scientific studies, which, in my question, hasn't even been done properly, and then, after that, what sort of economic impact. Not the going in of it, though. What you have is you have a number of bureaucrats going around trying to play God, quite frankly. I don't believe God would have written a five-page letter to the Base Commander underneath this Act, and that's what they're doing. They're trying to play God over these species.

Mr. SMITH. So the Federal Government is ignoring the exact wording of the Endangered Species Act itself.

Mr. WOLFF. It's clear, to my mind, that this Act shouldn't even be applied whatsoever in the case that we're involved in today.

Mr. SMITH. Bob and Danny, I like your point, which I echo, as well. And it seems to me that oftentimes the Federal bureaucrats don't realize or don't understand or don't appreciate that they're dealing with real people. They talk in terms of theory, we talk in terms of reality.

And you talk about the small private property owner, the small farmer, the rancher, so many people who are here today, who have spent years, sometimes generations, investing every penny they have into their property. And they're getting up at five in the morning, they're working till dark, they're sometimes working seven days a week. They've invested their entire livelihoods, their enter lives in this property.

And then the Federal Government comes along and through a regulation, environmental or other regulation, reduces the value of their property by 30 percent or half or whatever it might be. It seems to me not only is it unconstitutional, it's absolutely unfair to make one individual private property owner absorb the burden and pay individually for what the Federal Government is doing.

If the Federal Government puts a highway through your backyard, it has to compensate you. So why shouldn't it compensate you when it takes your property because of regulations? When the Private Property Protection Act came to the Judiciary Committee, that I sit on, I amended it so that if the private property value went down ten percent, we would compensate private property owners. When it passed the House, that had been increased to 20 percent. But the point there is you have to act in a way that is fair to everyone.

And, by the way, I know some people think that by compensating the private property owner, we're going to bankrupt the taxpayer. That is not our intent at all. What we're doing is forcing the government to pay for it and by forcing the individual department to pay for the costs of the devaluation of the land, we're forcing the government to set priorities and, quite frankly, not to abuse the Endangered Species Act.

The result is that there is not going to be the cost passed down to the private property owner. It's going to be a cost that's absorbed by the government and the government is going to reduce the enforcement of these regulations. Would you agree with that and do you think we're heading in the right direction?

Mr. STALLMAN. Congressman, we agree 100 percent.

[Applause.]

Mr. SMITH. That's the reason I asked. Danny?

Mr. MCFADIN. Congressman, I'll get back to this again. I know they must be compensated if they take something from them, but a lot of these people's parents and grandparents were born in some of these homes. They don't want to sell out their home because somebody's got a dern species that they want to save.

[Applause.]

Mr. MCFADIN. They want their property. Their fathers and their grandparents, they lost blood out there. A lot of our and yours, too. Our parents fought World War II for our freedom in this country and it's just not right and it's got to be stopped. If one of these people loses their property, it's wrong.

[Applause.]

Mr. SMITH. To me and I think certainly to the people who are here today and I think to our panelists, as well, the idea of the constitutionally protected right to compensation is really the civil rights of the day, just like other civil rights issues were the day in the 1960's. This is just as significant, just as important, just as crucial, just as much of a constitutional right when you talk about compensating landowners as the civil rights legislation of the 1960's.

Let me end, Mr. Chairman, by thanking Bob and all the members of the Texas Farm Bureau—I have a hunch you have a few members who are here today—for your support of our hearing today.

Mr. POMBO. Thank you. And Mr. Bonilla.

Mr. BONILLA. Thank you, Mr. Chairman. Mayor, if I could begin with you. Sometimes I wonder how you maintain your sanity dealing with some of this garbage that is so thrust upon you all the time. Sometimes within the confines of my door, I will throw something across the room when I hear about the latest infringement on what's going on in San Antonio.

You pointed out something a lot of folks—as people have pointed out in this panel before. Your presence is so important because, yes, we all understand the huge infringement on property rights in the rural areas, but San Antonio, with the military bases—you mentioned briefly a point that I'd like you to elaborate on.

All the bases have been red-lined because of the Endangered Species Act and the threat to the water supplies. To think of the devastation that all the installations would suffer if every base in San Antonio were affected, tell me how many jobs we're talking about, Mayor?

Mr. WOLFF. Well, just at Kelly Air Force Base alone, we have over 20,000-some-odd people working there. At Brooks Air Force Base, which is on the list to be closed, it's about four to 5,000 people that are affected there. These are the two primary bases that they're looking at doing, and we've got a real fight on our hands.

It's a short-term fight because that recommendation is going to be made by July of this year. So we're caught in this terrible, terrible thing called consultation. I mentioned the five-page letter that was written to Randolph Air Force Base and it states in there that

the federally-listed species must be addressed by all Department of Defense installations.

So in this particular instance, if he wanted to add two people and you're going to flush a few more toilets, he's got to file an impact of what that's going to do to the springs in Comal. He has no more idea what it's going to do to the Comal Springs than anybody would have, but this is what we're under.

Right now, there are 69 Federal agencies in the city of San Antonio that employ a total of about 87,000 people. That includes Defense, as well as the others. But HUD and all of the rest of them are affected by this Act as much as the Defense installations are.

Mr. BONILLA. And that would literally destroy what's known as Military City, USA.

Mr. WOLFF. We have, there is no doubt about it, outside of Washington, D.C., the largest area of retired military in San Antonio. We've been totally supportive of our Defense year in and year out and during the very, very difficult times. We are known as Military City, USA, and to take an act like this and have it as a factor in closing one of our bases is a tragedy not only to our city, but also to the fact that our Defense installations are real critical to the defense of this nation.

It's just absolutely crazy what they're doing.

Mr. BONILLA. Mayor, thank you for being here and we all wish you well. San Antonio will miss you in a few weeks when you leave office. You've done a great job for the city.

Mr. WOLFF. Thank you.

Mr. BONILLA. Danny McFadin, I'd like to move to you now and I would also like to say that I am very proud to have you as a constituent. You were the first one, I recollect, in Uvalde County who actually came up and on purpose addressed me as Henry Knapp Bonilla. I've got a couple of questions for you this morning.

In many cases, when a species is listed and the critical habitat is declared on property, the process then sometimes occurs that you develop a habitat to meet specifications. I'm asking this question because I'm wondering if, when an effort is made to develop habitat, as directed by Fish and Wildlife or whomever, how successful has the delisting program gone?

And the reason I'm asking is because we have a larger agenda, I suspect, that's going on here, the socialist agenda that really doesn't care about developing a habitat.

Mr. MCFADIN. I agree with you, Henry. I think it's a socialistic movement for the land. If they wanted to really—if they wanted to control the species, like the Fountain Darters, especially, or the Golden-Cheeked Warbler, why in the world aren't they out there trying to do something about it instead of trying to take a person's property or tell him what he's going to do with it?

The Fountain Darter—sure, they sued and they said that Fish and Wildlife didn't have a recovery plan for them, but I don't know if they've got much of a recovery plan today. I don't think they're out there saving them and moving them around to some of these other springs where they'd grow.

And I understand, from I guess through people that know about species, if they did move them, they'd probably take on the characteristics of the species that are in that particular habitat, wherever

they move them. A lot of these species have gone away by predators anyway and you never—as humans go ahead and develop the environment, as we seem to be doing in our lifetimes, a lot of these species are going to go out of the way anyway. You couldn't save them if you tried.

Mr. BONILLA. My final question, Danny, relates to something that Mr. Thornberry asked earlier. That is that the left wing in this country and the national media will sit here and say that people in this room are not concerned about the environment, that you just have some selfish motivation. So would you please help us with that? What would say about that?

Mr. MCFADIN. They just don't really know what living out in the country and living off the land is whenever they say that, because a person that lives out in the country is more concerned about his environment and his water and his surroundings than anybody. A lot of people in the cities have no idea. They want to see these birds. A lot of these people sit out there and listen to them in the afternoons. A lot of them here, they never hear that. They're just completely wrong.

But that's our fault. We don't do a good enough job of promoting what we do in life. We seem to be—we don't want to toot our own horns. I guess we were raised by that way. But, by golly, it's time we're going to start having to.

[Applause.]

Mr. POMBO. Thank you all for being here today. I'd like to thank the panel very much for their testimony and for their answers to our questions. Thank you.

I would like, at this time, to call up our next panel. The panel consists of John Merrill, David Bamberger, Margaret Rector, Maury Hood, Robert Brandes, and Steve Paulson.

We're going to get started with our next panel. We'll start with Mr. Merrill. You may start.

STATEMENT OF JOHN MERRILL, TEXAS AND SOUTHWESTERN CATTLE RAISERS ASSOCIATION, FORT WORTH, TEXAS

Mr. MERRILL. Thank you, Mr. Chairman. My name is John Merrill and I want to thank each of you for coming here to the countryside to hear firsthand what our problems are and hopefully some ways we think will correct some of them.

My great-grandfather came to this county, Kendall County, from Georgia in 1856 to ranch and then, in 1872, moved to the other end of these 33 counties and we've raised under the same brand for the past 123 years. In the last 35 years, adjacent to these counties, my son John and I have with careful livestock management been able to restore some range plants and wildlife that were thought to be gone.

Today, I represent the Texas and Southwestern Cattle Raisers Association and the National Cattlemen's Association. I'm the Director of one and past Director of the other and a member of their Land Use and Environment Committees.

Together they represent 230,000 cattle producers across the United States from coast to coast. Our livelihoods and our futures depend on the wise management of the pastures, rangelands and grazeable woodlands that cover over half of the United States and

are the major habitat for not only endangered species, but a lot of others, as well.

No one has more personally to gain or lose from the management of these renewable natural resources than we do. Cattlemen would like to be, and in most cases are the best friends of endangered and other species, but the current law, its interpretation and implementation by Fish and Wildlife provide nothing but disincentives for those with the greatest opportunity for protecting those species. Ranchers and farmers are deathly afraid even to acknowledge that they may have endangered species on their property.

They fear the severe penalties, the lawsuits, land use restrictions and the loss in property values that have resulted from administration or even the threat of it. This situation makes it a curse to be host to listed species, and that's a heck of a note. The good stewardship which has fostered their protection over all these years and has been an asset to the landowner now becomes a liability, even though this stewardship has extended across several generations, as you already heard this morning.

The Endangered Species Act confers more authority to restrict human activities than any other Federal environmental law. It has been used and abused by those opposed to economic activities as a challenge to those activities, often for reasons quite unrelated to species conservation. It has become a statute of choice for mounting administrative and judicial attacks on legitimate economic enterprises. These attacks have decimated the economic and social viability of specific industries and regions, with negative fallout effects on all other citizens and areas of the United States.

Up to now and until the Act and its administration are corrected, the turmoil and the losses it has caused far outweigh verifiable improvement in the status of endangered species.

I'd like to quote, if I may, some of the losses that have been referred to. The Commission did an independent study of land values in these 33 counties compared with all 254 in Texas, found the loss of 6.697 billion dollars in 33 counties. Now, there have been other causes of decline in land values, but whereas these counties represent only 13 percent of the aggregate, they suffer 22 percent of the loss.

This decline—even the presence or threat of endangered species restricts use options of property; not only is it declining land values, but the tax base and revenue to support schools and other public needs, the effect on the collateral and financial stability of borrowers and their lending institutions. The adverse effects on the economic and social health of the region and its people are serious and extend to the state as a whole and beyond.

Then consider that endangered species presently listed and proposed cover almost the entire State of Texas, which, fortunately, is 95 percent privately owned. Placing these landholdings, large and small, under the jurisdiction of Fish and Wildlife not only reduces private property rights and values, but trashes basic principles that Americans hold dear and have fought and died for several generations to earn and preserve.

It is incredible that while every other nation in the world that has tried central government control and failed miserably is fleeing it as far and fast as possible, some in the U.S., both in and out of

government, are pursuing central government regulation of our lives and property with blind dedication.

The Endangered Species Act not only is flawed, but the interpretation and implementation of it have been horrendous and sometimes laughable, if they weren't so serious. Can we take seriously a Fish and Wildlife brochure that encourages pet owners to bell their cats so the little birds will know when they're being stalked? How can we follow the commands of Fish and Wildlife officials who are not consistent in their directions and in their responses to questions? How can Fish and Wildlife be so absolutely inflexible on many occasions and so indecisive on so many others, while the victims wait hanging in the wind for an answer?

I dislike even constructive criticism without suggestions for improvement, and these will be very specific. The present Act is fundamentally flawed in concept and implementation. It should be replaced with legislation that's common-sense, carefully constructed, science-based, ecologically and economically sound, and with strict respect for constitutional private property rights.

[Applause.]

Mr. MERRILL. These provisions should include, and, goodness, I hope there is no thought of doing anything but rewriting the Act, with the following provisions. Number one, careful determination of which species are in natural decline that can't reasonably be halted and which declines are caused by human activity with reasonable hope for survival in nature by appropriate action. Don't list introduced species not native to the region.

Number two, thorough investigation, scientific documentation, and analysis before endangered species listing and habitat decisions. All the problems begin not only with the listing, but with the threat of listing as it currently occurs. List only the species for which the following science-based data have been determined: historically, how many were there and where were they; how many are there now and where are they; how many should there be and where should they be; what will be the cost to establish or reestablish and maintain this number of plants and animals? Then and only then can it be determined that the species is, indeed, endangered. And with this information on which to base a sound decision, that determination to list and support should be made only by an act of Congress.

That's why we sit here.

[Applause.]

Mr. MERRILL. And then, further, to delist any previously listed species which have not met the above common-sense criteria. Third, maintain meaningful balance of species needs with socioeconomic reality; fourth, provide positive incentives and workable procedures to encourage participation by the landowners in recovery efforts and to maintain or improve habitat management.

Five, respect private property rights.

[Applause.]

Mr. MERRILL. And, six, fully compensate landowners for any restricted use which results in loss of value or productivity related to endangered species compliance.

There's a second factor, and that is that we've lost our technical assistance from SCS for grazing lands because 98 percent had to

go to crop lands under GSA-85. When you see grazing the lands conservation initiative, we need your support for it.

These two pieces of much-needed legislation will accomplish more environmental improvement with maximum private voluntary participation, as it should be, and with less cost to the taxpayer than almost any other actions Congress could take.

Let's back up, start over again, and get it right this time. Let's use common sense, sound science, and include the foregoing provisions to write a workable, cost-effective, and constitutionally correct Endangered Species Act that will truly enhance habitat and encourage the survival and well being of endangered and other species. The cattlemen of America will stand front-rank in producing from our renewable natural resources while protecting them for future generations.

We deeply appreciate the concern of our Congressmen in recognizing the major problems associated with the present Endangered Species Act, in gaining additional knowledge and understanding, as you're doing here today, and working to rewrite an act that is sound, fair, and effective.

Thank you again for allowing us to participate in this process.

[Applause.]

[The attachment, "Reinventing Government", to statement of John Merrill may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Bamberger.

STATEMENT OF J. DAVID BAMBERGER, SAN ANTONIO, TEXAS

Mr. BAMBERGER. Thank you very much for the invitation to have a little input into your hearing. I have spent the last 27 years of my life, some of it unknowingly, being an environmentalist rancher. Today that seems like an oxymoron. How can one be an environmentalist and a private land-owning rancher when so much controversy today separates and pits the two against one another? I want to answer that with my testimony and my beliefs.

Twenty-seven years ago, I purposely searched for and bought what the locals describe as the worst piece of real estate in Blanco County, Texas, 5,500 acres of hills and rocks, wall-to-wall with the much despised and maligned Ashe Juniper tree, which we commonly call cedar. This ranch had no water, it had no grass, and basically it had no wildlife.

A soil conservation technician at the time estimated that it would take 41 acres of this land to support an animal unit. Now, for those of you who don't know, that's a cow and a calf. That wasn't very much incentive to raise cattle. Income back then from deer leasing was 3,300 dollars. The deer were scarce and they were pretty small.

But today on this ranch, after clearing thousands of acres of cedar, we run a cow and calf to 20 acres and the income from wildlife last year was 42,000 dollars and it's still rising. On my shallow, calcareous land today grasses grow profusely, water is everywhere, microorganisms and insects live there and the ranch is a sponge for wildlife of all descriptions, even the endangered Golden-Cheeked Warbler and the Black-Capped Vireo.

What I have learned from the many years of studying nature rather than studying books is that wildlife preservation is depend-

ent upon biological relationships that exists between plants and animals. And what I learned as a businessman was that these relationships, which we know today as habitats, were feeding and protecting these species that were necessary for me to make a profit raising cattle and selling those deer leases.

Now, how does this relate to the Endangered Species Act? Well, my message in this regard is that protecting endangered species is profitable.

[Applause.]

Mr. BAMBERGER. One of the trends that was brought on by the environmental movement is that of non-consumptive uses of wildlife. It's called nature tourism or eco tourism. I call it people ranching because we, as landowners, can capitalize on this just as we profit from cattle ranching and deer hunting. I am aware of a ranch right here in the Hill Country that brought two groups to their ranch and in those two groups, the ranch owner took in 14,000 dollars just for the bird watching. And the primary reason that these two groups came to that ranch was to see the endangered Golden-Cheeked Warbler and the endangered Black-Capped Vireo.

In 1993, gentlemen and ladies, up here on Lake LBJ, which is about 30 miles from my ranch, there's a boat dock sticking out on the water and some little bird got blown off course from its Pacific flyway, it's called the Blue-Footed Booby. Right today he's in one of our state parks. That little bird's navigational system got knocked out and he landed up there on that boat dock and stayed six months. And let me tell you it's estimated that a quarter of a million dollars was spent by people coming from Connecticut and Florida and Missouri and Ohio, all over the nation, just to look at that little bird and write his name down in their little lifetime book.

Well, they spent money on rental cars, they spent it on hotels and gas stations and restaurants and so on. I mention these two actual events because they point out that there is economic incentive for rural landowners to provide habitat for endangered species.

[Applause.]

Mr. BAMBERGER. My own income, my own personal income has risen, as well as the quality of life for those of us who live on the ranch because of providing and protecting habitat for all the wild, as well as the domestic species. The Endangered Species Act has not been an impediment to that progress. It has been an encouragement.

The Endangered Species Act helped put environmental protection and species survival on the national agenda and both of these are necessary for our country's economic health and, in the long-term, for human survival. The tragedy of the Act is that it fell into the hands of bureaucrats and judges who force-fed it to the American people, with little thought for the necessity to inform and educate, as well as to enlist the landowner and citizen assistance.

It has been top-down engineering and some regulatory reform is needed, but repeal of the Act is not.

[Applause.]

Mr. BAMBERGER. The American people, as shown by poll after poll, are desirous of protecting species and the environment. You

do not want to send the wrong message to the people. Failing to reauthorize this Act is like saying that plant and animal diversity is not important anymore. The role that government should play here is to provide leadership by keeping attention focused on the subject.

Misinformation and misunderstanding have been created by the regulators, by landowner organizations, conservation organizations, the media, environmental activists and scientists. They are all somewhat guilty. However, I believe that most of the horror stories you have heard, particularly those outside the jurisdiction of the major cities, are anecdotal.

As an example, land prices here in the Hill Country were depressed because of a recession and the collapse of most of our financial institutions, not because of an endangered species.

[Applause.]

Mr. BAMBERGER. With the recession behind us, real estate prices in the Hill Country are now on a tremendous rebound, with prices up ten to 15 percent each of the last three years.

There have been many 20th Century issues that have been dodged by the legislature, only to be handled by the faceless bureaucrats and an imperial president or a faceless bureaucracy. Don't let this happen this time. Even Thomas Jefferson said let's go to the body closest to the people, and that's you, our House of Representatives.

Yes, there are changes needed in the Endangered Species Act and I believe they have been well debated. Make the changes, but provide leadership, as the goals of the Act are really worthy of our support. Failure to reauthorize the Act would reverse the progress that has been made these past 20 years. Environmental protection and species survival is on the national agenda and it needs to stay there or we humans could be the endangered species.

[Applause.]

["Additional Considerations for the Future" may be found at end of hearing.]

Mr. POMBO. Thank you. Ms. Rector, you may proceed.

STATEMENT OF MARGARET RECTOR, AUSTIN, TEXAS

Ms. RECTOR. My name is Margaret Rector. I am a small landowner. In 1973, I purchased 15 acres of unimproved land on Farm Road 620 in western Travis County, near Austin. This was an investment intended for my later retirement income.

In 1991, the Federal Government, through aerial surveys, declared that my land was suitable habitat for the Golden-Cheeked Warbler. Sam Hamilton, the local Administrator for the U.S. Fish and Wildlife, personally visited my land with a biologist and me at my request. He confirmed that a Section 10(a) permit would be required to clear or alter habitat for development. He stated that any clearing or related activities would constitute a take.

The Balcones Canyonland Conservation Plan that was intended to help small landowners and which took several years to develop was defeated by the voters of Travis County. Today, there is still no plan. My only recourse is to obtain a 10(a) permit, which is prohibitive in cost and totally unacceptable to me.

My land has been in limbo for several years. I need to sell it, as all I can do now is pay taxes which are increasing yearly. Dozens of prospective buyers have inquired about my land, as it is in a fast developing area of the county. When told of the restraints on it due to the Endangered Species Act, they are no longer interested. The assessed value on this land dropped from over 900,000 to 30,000 dollars. Devaluation is due largely to the Endangered Species Act.

Each year I have asked the Fish and Wildlife to reevaluate my land. In March 1994, they said that I could use 150 feet just off the highway front that had been partially cleared, but that the majority of the acreage would still require a permit. I did not think this a good deal, as it would adversely affect the sale of my land.

I am a single woman, 74 years old and retired. I would like to realize something from this investment now. My situation is a classic example of the unfairness of the ESA and is a flagrant violation of property rights decreed under the Constitution.

[Applause.]

Ms. RECTOR. I would like to see the Endangered Species Act rewritten. I believe small landowners such as myself should be exempt. My land is in an area of fragmented industrial development. I doubt that U.S. taxpayers will approve picking up the tab to compensate landowners. I hope that Congress will come up with a solution so that we can get our land back free and clear.

Thank you for the opportunity to speak.

[Applause.]

Mr. POMBO. Thank you very much. Before we go to our next panelist, I would just like to ask the people in the back of the room to please be considerate of everybody that's trying to hear. Some of the people in the back are saying they can't hear everything that's going on. So please keep it down low. Mr. Hood.

STATEMENT OF MAURY HOOD, TEXAS CAPITOL AREA BUILDERS ASSOCIATION, AUSTIN, TEXAS

Mr. HOOD. Good morning. Thank you all very much for being here. My name is Maury Hood. I'm a builder and developer in Austin, Texas, and, at times, I feel pretty endangered myself. I also serve as President of the Texas Capitol Area Builders Association, which represents developers and homebuilders in eight counties around Austin.

I am here today as a spokesperson for the landowners, homebuilders and home buyers in the Austin area, who confronted problems with the implementation and enforcement of the Endangered Species Act. Most importantly, I am here as someone who has personally experienced the impacts of the Endangered Species Act.

My testimony today will address two key areas—how the Endangered Species Act has adversely impacted the Austin area, with specific reference to how the Endangered Species Act nearly caused my personal bankruptcy, and several reforms necessary to make the Endangered Species Act equitable and efficient so that these situations do not continue to occur.

Since 1987, the Fish and Wildlife Service has determined that two birds and seven cave invertebrates in the Austin area require the Act's protections. After these listings adversely imposed or developed a moratorium in western Travis County, the county ap-

praisal district estimated the land values fell from over 335 million dollars to less than 57 million.

Indeed, my own project, Jester Estates, was foreclosed on by the bank as a result of Fish and Wildlife's inability to issue a permit in a timely fashion, and I'd like to briefly detail that experience.

In March of 1990, I began construction on Jester Point II, a 400-lot residential development. In order to purchase and develop this property, we secured an eight million dollar mortgage loan. This subdivision had previously been approved for development by the city of Austin.

In May of 1990, U.S. Fish and Wildlife emergency listed the Golden-Cheeked Warbler. The Jester development required a utility line across a dry creek, which would require me to seek a Section 404 Corps of Engineers permit pursuant to the Clean Water Act. As a result of the listing, it is now necessary to obtain a Section 7 permit from the U.S. Fish and Wildlife.

I promptly initiated the Section 7 process and in October, four months later, the U.S. Fish and Wildlife released only 37 of those lots which were under development. In December of 1990, I met with representatives from U.S. Fish and the Corps to reinstate the Section 7 consultation permit process for the remaining 350 lots.

Fish requested that I hire a biologist to begin the two-year Warbler studies. Fish and Wildlife Service mandates that the Warbler surveys can only be completed between April 1 and May 30. I complied, hiring a biologist consultant to complete the surveys, at a cost of over 6,000 per year. The biologist documented that there were no warblers within 500 feet of the property to be developed. However, we did find several birds near existing homes that had been there for several years and, as a matter of fact, found one in my own front yard that was only 50 feet from the street.

Armed with this information, I made a formal written request to U.S. Fish and Wildlife Service to issue a no jeopardy opinion and release the property. Six months later, in October of '91, we still had not received approval. Now, this is the Section 7, which has time limits that they're supposed to meet. At that point, we began to meet with the Austin Fish and Wildlife Office on an almost weekly basis.

Finally, on March 2, 1992, 15 months after we had initiated the formal process with the U.S. Fish and Wildlife Service and a full two years after we first started construction, Fish released a 65-acre, 136-lot portion of that development. Unfortunately, due to the fact that I was receiving virtually no income on the sale of lots from the project, I was unable to continue to make the loan payments on this protracted process. Consequently, on the same day, March 2, that Fish gave us their approval, the bank foreclosed on the property. We lost the property.

And adding insult to injury, in the two years that I spent waiting for a permit, I don't believe a single Warbler was saved. As a result, the testimony I offer today on necessary reforms to the Endangered Species Act is based on my personal observations of the Endangered Species Act failures. If these reforms are adopted, they may avoid duplicating the same problems in the future.

I believe that species preservation is a worthy national goal. Most homeowners would agree. We understand that Austin's natu-

ral environment makes it an attractive and desirable place for many families to live and work. However, Congress must ensure that the Act's significant land use prohibitions are exercised with discretion. Accordingly, the Act must be reformed in five major areas; listing decisions, designation of critical habitat, habitat conservation plans, compensation, and Federal cost-sharing.

First, let me address listing decisions. Controversial decisions taint the listing process. Fish routinely relies on insufficient and questionable criteria for listing species. Congress should ensure that the Act's protections are extended only to those species which are truly in danger of extinction, and the only means of accurately doing that is to improve the scientific data on which listing decisions are made.

Field testing should be required to verify the data used in the listing process. Congress should also direct Fish to peer review the data listed in the listing process. In Austin, the data for listing the Cave Bugs was so ineffective that there's already a delisting petition filed by the Williamson County Commissioners.

The second area I'd like to address is critical habitat. Nationwide, Fish and Wildlife Service has consistently failed to designate critical habitat, although the Act calls for it. This is despite Congress' clear mandate to do so. As a result, Fish and Wildlife Service regulates all habitat, whether or not it supports endangered species.

The untenable result is that virtually every proposed development, from the construction of a single-family home on a five-acre lot to the widening of an existing road to a 100-lot subdivision, requires prior Fish and Wildlife approval. Even when there have been studies to prove that there were no listed species on the subject properties, U.S. Fish and Wildlife Service has threatened criminal prosecution for clearing underbrush.

Moreover, since there is no requirement to notify the property owners that they own a potential habitat, many individuals are unaware of their responsibility under the Endangered Species Act; yet, they can still be prosecuted for a criminal offense.

I want to emphasize that critical habitat designation is extremely important not just because it identifies land which is essential to species recovery, but because it is the only point at which economic and other relevant impacts can be considered. Congress should enforce and mandate that critical habitat is designated at the time of listing.

The third area which should be revised is the Section 10(a) habitat conservation planning process. The 10(a) permit process is critical. It is a landowner's sole remedy to the Act's land use prohibitions. Presently, the Endangered Species Act gives preferential treatment to Federal agencies through the Section 7 permit process. For example, Section 7 has a prescribed time line, although, as reported, it is often not met, in which Fish and Wildlife must render a final decision.

Section 10 permits don't do that. They can take ten, 15 months to two years, sometimes even three years. Federal agencies can consult with Fish and Wildlife on their permits, landowners can't do it. We would like to see the same treatment for landowners that

Section 10(a) has provided to Federal agencies through Section 7, with prescribed time lines.

Further, Congress should mandate that habitat conservation guidelines be developed for each listed species. As the ultimate judge of the HCP's merits, Fish involvement is essential. In Austin, until recently, U.S. Fish and Wildlife Service never provided any meaningful involvement in the development of the plan. I'm talking about the BCCP. The agency routinely declined to comment about whether the draft BCCP might eventually be acceptable. Without Fish's constructive guidance during the planning process, we wasted scarce financial resources and squandered years trying to develop an acceptable plan.

The numerous species listed prompted the development of the Balcones Canyonland Conservation Plan. The BCCP is a regional multi-species habitat plan which Secretary Babbitt praised as a model for the nation. Unfortunately, the plan has been six years in development and has not been submitted to Fish and Wildlife for final review. Despite being the experts, Fish has refused to define such basic parameters as minimum preserve size, location, maintenance standards and funding requirements.

Now let me talk about costs. The BCCP has no provision for additional funding outside of fees imposed on landowners. Conservatives estimate that the plan's costs are in excess of 168 million dollars over and above the 23 to 25 million dollars that has already been spent. If the preservation of the Golden-Cheeked Warbler and the Black-Capped Vireo, which have international migratory patterns and inhabit 33 of 88 Texas counties, is a national priority, why should a few property owners bear the lion's share of that cost?

[Applause.]

Mr. HOOD. The Federal Government should share equally in the cost. Furthermore, the Endangered Species Act's stringent limitations on the use of private property should mandate compensation to the landowner. Congress should require Fish and Wildlife Service to formulate a claims process and timetable for restitution.

Time, certainty and predictability are crucial to those of us affected by the Endangered Species Act. The recommendations offered in my testimony, and certainly the property owners are sensitive to the needs of the protection of the endangered species.

Thank you for the opportunity to offer my suggestions. I'll be happy to answer any questions later. And I have submitted a more complete testimony with my written and oral testimony. Thanks.

[Applause.]

[The prepared statement of Maury Hood may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Brandes.

STATEMENT OF ROBERT R. BRANDES, AUSTIN, TEXAS

Mr. BRANDES. Mr. Chairman, Committee members, thank you for this opportunity to speak. My name is Robert Brandes. I have worked for over seven years to protect private property rights. I have been a member of two task forces, one of which was the BCCP, Balcones Canyonland Conservation Plan, as a landowner representative.

The Hill Country, Austin, Texas, Travis County, is a take-no-prisoners battleground over the concept of private property rights. And let us never forget that prior wars have been fought and lives have been sacrificed to protect this very sacred right, the right to own and responsibly——

[Applause.]

Mr. BRANDES. The right to own and responsibly utilize private property. While in concept it's fundamental and often taken for granted in this country, it is only a distant dream in many others. It is this concept of private property that has historically set America apart from much of the rest of the world. We are today again fighting to preserve that right, fighting to prevent our own government from bureaucratically mandating away our constitutional rights.

The ESA has evolved, metamorphasized into a method of acquiring private property without paying for it. If you can put enough restrictions or conditions on the use of one's property, you don't have to own it with the title. You own it *de facto*.

Alarming, these changes are not coming within the framework of the Democratic process. They are occurring through bureaucratically-mandated regulations and strategically organized group pressures.

Destroying either the Constitution or the integrity of the constitutional process will not save the environment or endangered species. It will, however, do grave damage to our system of government.

Fish and Wildlife is an administrator that is totally out of control. Past Governor Ann Richards publicly referred to their methods as "ham-handed". They are drunk with power and use that power to intimidate. You often hear of the private landowner solutions. Well, quite often, these solutions are almost as punitive as the Act itself, as Ms. Rogers just said. In my case, they wanted to restrict the use of my property where instead of having lake front property, which has great value, it was the equivalent of west Texas scrub ranch land that removed any use of the lake at all.

They have also put us effectively under marshal law. The Service has, for all intents and purposes, put the Texas Hill Country under marshal law. In order to utilize land today, every landowner in a vast expanse of central Texas must now receive clearance from the Service or face the threat of possible Federal prosecution.

This bureaucratic intimidation has no place in our society. It tends to make potential lawbreakers out of otherwise law-abiding citizens. The Service has become the enemy within, Fish and Wildlife, in their intimidation.

The Service's broad powers under the Act must either be redefined or strictly limited. Too much unregulated authority is granted the Service. As when the Service's State Administrator called a meeting of some 60-plus Federal agencies operating in central Texas to inform them that their activities would have to be reviewed and approved by the Service. This, coming on the heels of the critical habitat debate, was clearly an attempt by the Service to intimidate central Texans.

Fish and Wildlife's interpretations of the Act are constantly varying. You have in your packet a copy of a memo that I received

through the Freedom of Information Act and, in it, it makes a very interesting statement. It says under our "current interpretation of what constitutes take." This implies what we landowners know. The interpretation of the "take" constantly varies. You never know what the rules are because Fish and Wildlife have no rules. They play under the rules of the day or they go under the impulse of the day. This must be addressed. It's a critical problem.

Ironically, Fish and Wildlife has become the greatest destroyer of habitat in our community and in central Texas. Paradoxically, from a practical standpoint, the Service is probably the single greatest cause of habitat destruction in the central Texas region. To have endangered species today on one's property in central Texas is the kiss of death. It is to lose all or part of the properties use for other than endangered species protection unless a substantial payment is made in the form of a mitigation fee or "take" for the destruction of habitat.

Another very dangerous problem we have here is the special interest influence. In particular, the Nature Conservancy and other Lands for Public Trust, they have an enormously large conflict of interest. In our particular case, the Nature Conservancy, in the form of a "loan," funded one of our local elections to the tune of 50,000 dollars, and this was an election that directly related to the acquisition of land, for the purchase of land for the BCCP. And, also, they have designated central Texas as one of their last great places and it encompasses over 18,000 square miles of Texas land, from Kilene to Del Rio. I contend that this has possibly put a cloud on the title for every piece of real estate in 18,000 square miles. If you don't tell potential buyers of the potential problems, you yourself, a seller, are subjecting yourself to possible litigation on down the road.

I urge you to be aware of these habitat conservation plans, such as the BCCP. They are little more than corruptive development blueprints. They determine who gets to develop, when, where and how much it costs. And as a result, these corrupting influences usually play a very destructive role in the process.

You are often told that the Act hasn't devalued property. Well, there's a subsequent paper that I have asked to be distributed to you, which is a letter from Art Cory, who is the chief appraiser for the Central Travis County Appraisal District. He is the chief appraiser. And in it he states, and he refers to an endangered species ordinance, the value of the land potentially goes from 335 million dollars to 15 million dollars and the tax revenues decrease from 6.7 million to approximately 300,000 dollars annually. Now, that is one of the potential impacts of endangered species implementation.

I think it is very unfair to single out certain responsible segments of the community to bear the brunt of the expense for the rest of the nation. If it's good for all, all should pay. I am here to suggest major changes be made to the ESA if it is to succeed. It, first of all, must be made user-friendly. Today's Act is absolutely not user-friendly. In fact, it is antagonistic and conflicts with any friendly use.

The irresponsible bureaucrats and bureaucracies must be reigned in. They are flat running amuck. They are a law unto themselves. And, lastly, funds must be——

[Applause.]

Mr. BRANDES. And, lastly, Federal funds must be made available. Local communities and local landowners simply do not have the amount of money required to implement this law. If it is a national issue, then it should be funded nationally. And, lastly, realism and common sense must replace idealism and wishful thinking if this Act is to work at all.

Thank you for this opportunity to speak. I'll be happy to answer any questions.

[Applause.]

[The prepared statement and attachments of Robert Brandes may be found at end of hearing.]

Mr. POMBO. Thank you very much. Mr. Paulson.

STATEMENT OF STEVE PAULSON, SWCA ENVIRONMENTAL CONSULTANTS, AUSTIN, TEXAS

Mr. PAULSON. My name is Steve Paulson. I'm from Austin, Texas. I'd like to thank you for inviting me to speak today. I work for a company that has been involved in endangered species issues for the last ten years or so in the United States and for the last year or so working on endangered species problems here in central Texas.

Today I could talk to you about many things, I have an opinion on all of them, and friends of mine will tell you that is the case. But I could talk to you about critical habitat, recovery plans, permitting procedures, regulation, regional habitat and conservation plans, et cetera. But today I want to talk about the listing process that's found in Section 4 of the Endangered Species Act, because I think it's one of the key elements and achieves all other enforcement powers the Fish and Wildlife Service has. And how we clarify in promulgating obvious rules on these things will have a lot less confusion after species get listed, if they are, indeed, warranted for listing.

First of all, I'd say that the Endangered Species Act has received a tremendous amount of scrutiny in the last few years because of the potential species which are at risk of becoming extinct, but also because of the potential power of the Endangered Species Act to restrict or constrict the property rights and value invested in the land.

Today, given the brief time, I'm going to talk about the listing package. My concern here is the inadequacy of the science used to implement Section 4 of the Endangered Species Act. My first case study is the listing of five cave-dwelling invertebrates in the Austin, Texas area. U.S. Fish and Wildlife listed five invertebrates on the 16 September 1988. Each of these species were known from only six or fewer small, shallow dry caves near Austin in Travis and Williamson Counties, Texas. Urban, industrial and highway expansion are planned or ongoing in the area containing the cave habitat for these species.

According to Fish and Wildlife Service, the development could result in filling or collapse of these shallow caves, disturbances of water patterns that affect cave habitat, introduction of exotic competitive and predatory insects and other organisms, and pollution

of the cave system with pesticides, fertilizers, oils and other harmful substances.

At the time of listing, it was asserted that the petitioned species had severely limited range and habitat, and that they had limited ability to colonize new habitats. The erroneous theory that caves functioned as islands was current at the time and it was believed that caves were isolated special habitats.

It was believed that the petitioned species had very narrow requirements for specific climate factors, such as humidity, and that various anthropogenic surface alternations could adversely affect microclimates in ways that would be detrimental to the species. It was believed that the small size of the habitats and the purported fragile nature of the cave ecosystems would make the species vulnerable even to isolated acts of vandalism, and that vandalism would increase as the human population of the area increased.

This is what the Fish and Wildlife put out in promulgating their rules. Two government agencies at that time, I think it was the Highway Department and the Soil Conservation Service, who commented during the listing process, questioned the extent and amount of research which had been conducted to that date documenting the presence of any or all of these caves in the central Texas area since a sizable portion of the area is karstic and a number of caves had already been documented. U.S. Fish and Wildlife responded that although there were a large number of solution caves near Austin, caves in many areas do not have the specific habitat features associated with these five species. The attention that this area has received from cave biologists, such as the Fish and Wildlife, a quote, because of its "proximity to the large active university and museum," led Fish and Wildlife to believe that "the potential for significant range extensions is too limited to affect the species' status."

By 1992, however, the known range of most of the invertebrates had grown from the six or seven caves which comprised the last remaining habitat for the five species in 1988 to most of the developable areas in north central Travis County and Central Williamson County. The expansion of the range without clarification of the earlier claim established that U.S. Fish and Wildlife had either listed the species in error or that U.S. Fish and Wildlife post-listing policies were arbitrary and capricious extensions of ESA jurisdiction beyond its legal limits.

The U.S. Fish and Wildlife Service response to this information was to claim that although the species was in more caves than originally stated, which is upwards of 100 or so, that the limited range still warranted listing. However, recent findings on one of the listed invertebrates indicates that the range for this species extends at least 35 miles to the west in an area that U.S. Fish and Wildlife claims that the species could not possibly be located. And the reason, obviously, was they never looked.

Case Study Number 2 is the petition to list nine cave-dwelling invertebrates in the San Antonio, Texas area. On 9 January 1992, five environmental organizations petitioned U.S. Fish and Wildlife to list nine species of invertebrates that were alleged to live only in a few caves in north and northwest Bexar County, Texas, San

Antonio. A total of 16 caves were mentioned. The petition was prepared using information provided by certain consultants.

I will say that of the nine species, six of those nine are only found in one cave. One had been selected on 4 October 1963, one had been selected in 1983, and one had been selected in 1965, and that's the only time these species have ever been collected, period.

After delaying the 90-day finding for almost two years, Fish and Wildlife indicated that the listing may be warranted based on threats such as fire ant infestation of local caves and cave destruction and deterioration. The petitioners claimed, and Fish and Wildlife agreed, that both alleged threats were the result of urbanization.

After it was pointed out, after information was submitted to Fish and Wildlife contrary to the information of the petitioners, the Deputy Director of the Fish and Wildlife initially determined that the petition to list was not warranted. The response of the state office of Fish and Wildlife was to hire individuals to conduct more research, to gather more data on the alleged threats. Now, this would normally be an acceptable procedure, except in this case, the research funds were distributed to individuals who originally provided the information to the petitioners for listing and there were no procedures for competitive bidding.

In fact, no one in the affected areas were notified of this funding until researchers called landowners and sought access to the property.

My Case Study 3 is the listing of the Golden-Cheeked Warbler. The Golden-Cheeked Warbler was emergency listed in May of 1990. The emergency listing was initiated because alleged legal and illegal clearing of habitat could have led to a loss of significant recovery potential for the Golden-Cheeked Warbler. The habitat incidents referred to in the emergency listing all occurred in the Austin area. Even by U.S. Fish and Wildlife Service accounting, approximately 31,500 to 126,000 acres of habitat existed in the area at the time of the emergency listing. The emergency listing cited two instances of actual legal and illegal clearing, which was about 220 acres, which is less than one percent of one percent of the habitat that they had identified.

Construction of commercial and residential development in areas of known Golden-Cheeked Warbler habitat in western Travis County was cited as the underlying reason for the clearing. The year 1990 was also one of the worst years for commercial and residential development in the Austin area and little new development was occurring anywhere. There were probably 100 homes built in 1990 in that particular area. This is a large area, which is Travis County.

On the same date, U.S. Fish and Wildlife published a proposed rule to list the Golden-Cheeked Warbler as endangered. This was in response to a petition filed on 2 February 1990 requesting that Fish and Wildlife prepare an emergency listing package. Fish and Wildlife had already expressed concern regarding the status of the Golden-Cheeked Warbler and had been awaiting the results of a study commissioned by the Texas Parks and Wildlife Department. This study, by Wahl, et al, was not available prior to the emergency listing nor the proposed rule.

The basic assumption of the Wahl report was that habitat destruction was the primary reason for the decline of the Golden-Cheeked Warbler. If standardized, open and objective peer review of the Wahl report would have occurred, many of the assumptions made by Wahl would have been shown to be based on an extremely limited data base which did not follow scientific methods.

Following the release of the Wahl report, local environmental groups promoted the Wahl report as the scientific evidence which unequivocally proved that the Golden-Cheeked Warbler merited endangered species status. Comments from Warren Pulich, the leading expert in research on the Golden-Cheeked Warbler, and other ornithologists were largely ignored if those comments questioned the validity of the Wahl assumption.

Unbeknownst to the public, a study had been commissioned in the spring of 1990 at the Parks and Wildlife Department, with Endangered Species Act Section 6 money, to groundtruth some of the assumptions on habitat by Wahl, et al. The report was still in draft form in November 1990 when Texas Parks and Wildlife Commission asked Mr. David Braun of the Nature Conservancy of Texas at a commission meeting on the Austin Regional Habitat Conservation Plan, that's what was called the Balcones plan, about the existence of the second status report on the Golden-Cheeked Warbler.

Mr. Braun responded that he was aware of the report. To the landowning community, this was the first time the report was made public even though it had been approximately six months since Professor Robert Benson of Texas A&M University had last been in the field groundtruthing certain assumptions of the Wahl report.

The Benson report does not conclude that the results represent the definitive study on the Golden-Cheeked Warbler. Far from this assertion, Dr. Benson would be the first to point out that the report needs further development. Nevertheless, the report calls into question some of the assumptions which were the key tenets of the Wahl report. One key example was the minimum size for viable habitat patch sizes.

Wahl contends that the Golden-Cheeked Warbler cannot exist in habitat patches of less than 50 hectares or basically 125 acres. The assumption was one of the essential variables in determining the total habitat and population for the Golden-Cheeked Warbler. In simple terms, maximizing the viable patch size restricts the total acres of habitat in the range.

The Nature Conservancy of Texas, Parks and Wildlife, Fish and Wildlife, Biological Advisory Team, and other key conservation biologists and environmental activists were aware of the Benson report findings. Yet, the public, especially the landowning community, was totally unaware of this report. The report was not enough to cause the dismissal of the Wahl report. However, why were the findings not investigated further nor made available for public comment during the rulemaking procedure?

I want to point out that a small group of Austinites presented this report to the Secretary of the Interior in November of 1990, and I was one of those individuals. It was just days before local Fish and Wildlife representatives had indicated that the bird would be listed. The group requested that Secretary Lujan extend the

emergency listing until next summer so another group could be commissioned to resolve the discrepancies between the Wahl report and the Benson report.

The response by Wahl, Braun and a host of conservation biologists and environmental activists was swift and virulent. The group was accused of having ex parte communication with Secretary Lujan and of attempts to delist the Golden-Cheeked Warbler. Suddenly, a simple request to discover the truth while the Golden-Cheeked Warbler was still retained all of the ESA protection was being described by the environmental activists as an attempt to cut a back door deal with the Secretary of the Interior to not list the species.

The main reason that ex parte communication had allegedly occurred was that the comment period for the listing had already closed. Please note that there are numerous examples of discussions regarding listings for endangered species in which environmental groups, scientists, conservation biologists, politicians, attorneys and landowners have discussed the listing process after the comment period had been closed and none of them have been accused of ex parte communication.

Mr. POMBO. Mr. Paulson, could I ask you to wrap it up?

Mr. PAULSON. Yes. I have a very important point here on this Warbler one. I realize this gets a little tedious. Further, why was this group meeting with Secretary Lujan in the first place? Answer—because the U.S. Fish and Wildlife Service and the Texas Parks and Wildlife had been maintaining in draft form a report which called into question one of the reasons the Golden-Cheeked Warbler was considered endangered in the first place.

As for Dr. Benson—and this is my major point here—a professor with impeccable credentials, he was severely chastised and dismissed by the Nature Conservancy of Texas, Parks and Wildlife, U.S. Fish and Wildlife, conservation biologists and environmental activists. In his gracious response to these critics, Dr. Benson considers their criticism with the requisite seriousness of a scholar.

He accepted certain criticism quite objectively and admits that there are flaws in his report. Still, his critics could not refute that his data points out potential flaws in Wahl's assumptions, assumptions that were supported by little data. As Dr. Benson ironically infers in his response, if the same scrutiny which was given to his report was applied to the Wahl report, it would be extremely doubtful that the Wahl report would have been accepted as documentation that the Golden-Cheeked Warbler should be considered endangered.

That's my three case studies. My recommendations for changes regarding the listing process are included. Thank you very much.
[Applause.]

[The summary and recommendations of Steve Paulson may be found at end of hearing.]

Mr. POMBO. Thank you. Mr. Merrill, you, in your testimony, talked about some of the effect on private property owners of the Endangered Species Act here in Texas. Could you point out a couple of those restrictions and their effect on the cattle business here in Texas?

Mr. MERRILL. It's really devastating. Whether you drove or flew here, you'll see that a good part of Texas has been invaded by Cedar or Juniper. It's one of the competitive plants that we have because of the leaf fall and the total shade, nothing else will grow underneath it, which makes it an erosion hazard, on the one hand, and not suitable for wildlife or livestock either one.

Although the listing says that only mature Juniper are necessary and when you boil that down, it's one per hundred acres. In several different instances, people who wanted to clear their land, and that is at their own expense, work to restore it to good condition, were barred from doing that by Fish and Wildlife, at the same time that another Fish and Wildlife representative said check with your local Soil Conservation Service and then they say that if the cedar was not there before, that it isn't endangered, you may go ahead and clear it.

But that kind of policy leaves you totally in jeopardy because the next person may come along and fine you for having done it. So you have that many million acres locked up, unable to treat it as it should be, because of the variation, on the one hand, and not sticking with the scientific data on the number and the kind that actually are required to provide a habitat.

Mr. POMBO. What happens to a cattle ranch if it does become overrun with the cedar?

Mr. MERRILL. Again, I hope you drive back to San Antonio. If you look on either side of the road, you'll see dense stands of cedar, ten to 12 feet high, with nothing growing underneath it. And a picture still is worth a thousand words and certainly more than any I could share with you. It completely obliterates the environment. And I would say to you that I have tended cattle out of the cedar break. I grew up in one. And we went to the backside with the horses and we started through the cedar and followed the clatter of the rocks until we got to an opening, and we'd take what we could find to the corral.

That is a poor way to serve the Lord and a lot like eating soup with a toothpick.

[Applause.]

[Laughter.]

Mr. POMBO. Mr. Bamberger—

Mr. MERRILL. I hope that was a fair response to your question.

Mr. POMBO. Yes, it was. Mr. Bamberger, I find your testimony very interesting and I think that there is a lot that we can gain from your experiences and your ranch. What changes could we make to the way the Act is being implemented today which would change, I guess, the negative incentive that is present out there right now into a positive incentive?

Mr. BAMBERGER. I appreciate that question. I think that's really what the Nation and you all need to address. I think the very first thing the Act—it should serve to inform the public about species that are at risk. I think that it should state clearly that it is not intended for land use control. I think the Act should include cooperation with already existing Federal and state agencies, as well as utilizing qualified volunteers from conservation organizations. There was a lot of rebuttal, for example, regarding using volunteers from the Audubon Society. Quite frankly, you don't have to have

a Ph.D. or be a rocket scientist to know birds. Some of these people are truly experts, worldwide, in regard to birds and I think the Act needs to allow and the implementation of it needs to allow for the use of conservation organizations and qualified individuals therein.

I think the Act should rely less on regulation and much more on information, education and cooperation. And this should be made clear to the regulators that are empowered by the Act. My own belief is that it's been the young people who speak genus and species who have the master's degrees and Ph.D.s but have never walked on the land that give misleading testimony swift as you've heard here today.

It's their abrasiveness and their inability to deal with and communicate with the public that alienates the citizens so much. I believe strongly in private property rights. I am a landowner and I've been a major one and I've had ups and downs as others have had. I don't want to see mother nature destroyed, because I believe we're stewards of this land. My ranch is not going to be shoveled up into my casket and planted somewhere with me. It's going to be there for a generation and a generation or two after that.

[Applause.]

Mr. POMBO. I believe—like I think most of the people in this country, I believe that farmers and ranchers can and have lived in harmony with their environment and it's because of the way land has been managed that we do have such a diverse culture. But if we ever do reach a point where private property must be taken for endangered species habitat, for whatever reason that comes up, if that ever does happen, do you support the compensation for the person that they are taking that private property away from?

Mr. BAMBERGER. Most certainly. I don't think there's any simple answers or simple solutions. I would like to take, if I can, just one minute. We're talking here in this particular area of Texas, the Hill Country, we're talking about this infestation of cedar that everybody is aware of.

The first thing I've got to say is that how did all this damned cedar get here if we were such terribly good stewards of the land. It got here because of poor land steward and management practices.

[Applause.]

Mr. BAMBERGER. It got here because we have highways and high lines and houses and people all over the place. It got here because we've failed to look into the future. I am a private landowner and I'm a flag-waving American, but I believe that a new ethic is necessary and the Congress should supply that leadership for this new ethic because we are over-populating this planet earth, we're over-populating the Hill Country of Texas—

[Applause.]

Mr. BAMBERGER.—with roads and highways.

[Applause.]

Mr. POMBO. Thank you. Mr. Stenholm.

Mr. STENHOLM. Thank you very much, Mr. Chairman. I really commend this entire panel for your testimony, your views. We thank you for your comments. I was particularly interested, Mr. Paulson, in your comments, having conducted a similar hearing as

Chairman of the Department Operations and Nutrition Subcommittee of the House Agriculture Committee last year.

One question regarding the Golden-Cheeked Warbler that we were constantly asked was under what basis, what information, what scientific background, what studies did you come to the conclusion for the initial listing? No one could answer the question and you provided very in-depth analysis today as to why. I asked at that time for those who had been a party of that to provide that information to me. To this date, it has not been provided and for an obvious reason. It is not there.

There are reasons to doubt, and this is one of the things that each of you in your own way have said today. We should not be doing these kinds of things unless we have proof that there is a problem. That's one of the problems that we have had in dealing with the Endangered Species Act. We have allowed those, in my opinion, to use their own personal opinions rather than the best science available, the best information available, and that always brings confrontation.

Mr. Merrill, I particularly appreciate your listing of some constructive solutions. It is far too easy for us to criticize. It is much more difficult to come up with constructive solutions that we can, in fact, put into place with which all can live and we can adopt and achieve those goals that we're all after.

I appreciate that very much and I know the Task Force will, also, because I think this is the basis under which we will, in fact, fix that which is broken in the current Act.

A couple of questions that I wanted to ask. Mr. Bamberger, I understand that you serve on the Private Lands Advisory Board to the Texas Parks and Wildlife Commission. You may want to ask or I may—I want a comment from you. Do you believe that this model of local advisory boards might be helpful for consideration in ESA?

Mr. BAMBERGER. Most certainly.

Mr. STENHOLM. Any other comments from any of you? Mr. Merrill?

Mr. MERRILL. Yes, sir. Mr. Bamberger also mentioned volunteers coming out to help. I'm not sure what help it was they were meant to extend, but I don't want those volunteers coming into my home and—

[Applause.]

Mr. MERRILL. Any more than I would invite unknown people to come redecorate my home or use professional decorators. That's my home, I live there, I will do my best to take care of it, and I have more to gain or lose than anybody on how well that's done.

And I would like to immediately respond to his question about how land has been managed. The profession of ranch management, the discipline of ranch management, is only about 50 years old. I've been saving. I didn't say that I'm a past President of the International Society for Ranch Management and member of the Wildlife Society and the Soil and Water Conservation Society. Greed has been charged with ruining this country.

I submit to you there's a lack of knowledge of grazing management, in crop land even. We learned how to farm from father to son or even professor to student in the university by experience

and if we tried it and it worked, we kept doing it until we found something better. But this country is really hurt by the people who didn't know how to graze, and I resent the charge that it was greed or anything like that. And this generation of ranchers, the new ethic is in this room. Those of us who—

[Applause.]

Mr. MERRILL. We have learned better and this generation is having to pay the cost of restoring what our forefathers unintentionally hurt and passed on to us and that hurts Mr. Bamberger.

Mr. STENHOLM. Gentlemen, I want to ask you another question along that line, because I have become very concerned with the fact that not just Fish and Wildlife and Soil Conservation Service personnel, anyone from government is no longer welcome on farms and ranches in the 17th District because of the fear that you have mentioned today.

If we could get a way—if we could get back to what made the Soil Conservation Service the great entity it has been and it has provided the leadership through voluntary means, if we could get back to a situation in which we had a better feeling about what was going to come from the heavy hand of government, would then you have the same feeling that you just expressed regarding visitation, local advisory boards, et cetera?

Mr. MERRILL. By those people that have been so very helpful and worked with us as landowners through Soil and Water Conservation Districts and at arm's length and mutual agreement, we have no problem at all unless they are required to expose their findings to other agencies, which, in turn, can use them against us. If you'll look back into the '40's, '50's and '60's, when SCS was at full complement on both grazing and conservation, we set a world record for conservation in the world and world leadership in conservation. And it was only as those numbers were depleted and that 98 percent were distracted to crop land, with only two percent left to help us on the 50 percent of the Nation that's grazing lands, have we not been able to use our own previous standard to apply as much of the new technology as is available.

So the grazing lands conservation initiative would be the very greatest step the Congress could take in helping us do what you said, and that's voluntary, effective, cost-effective, and constitutionally correct conservation.

Mr. STENHOLM. John, I intend to do all in my power to see that the GLCI is made a part of the 1995 farm bill and I think that will go a long way toward answering a lot of the questions we're talking about today.

Mr. MERRILL. Thank you.

[Applause.]

Mr. POMBO. Mr. Cooley.

Mr. COOLEY. Thank you very much, panel, for being here. I would like to ask questions of everyone, but we only have limited time. I want to go back to John and the thing with the cattle business. John, you know, in my part of the country, our people, cattle raisers have been very cognizant of the fact and appreciate your comments about past abuses, that we're paying the same price over and over, that we were maybe not as perfect as we could have

been, but we're much better caretakers of the environment and the land now than we were in the past.

I get really upset with people continually criticizing the past era, but we're much smarter today. Are you finding the same thing here in Texas, your Cattle Raisers Association, that we're finding in other parts of—the western part of the United States, when endangered species are brought up, that maybe our cattle people are not as protective as they were in the past, that we have a lot of mid-night backhauling going on?

Mr. MERRILL. If we have them, we can't talk about it. On the other hand, they prosper as our other livestock and wildlife prosper, the water developments, the shade, the diversity of the plant community. It's as important to good grazing nutrition as well as it is to wildlife and biodiversity. Those things can and will be done voluntarily and profitably if we are allowed to do it without only disincentives. The greatest incentive that can be given to us for endangered species is take away the disincentives.

[Applause.]

Mr. COOLEY. Thank you, John. Mr. Bamberger, I, too, as the Chairman, am very interested in your comments. In part of my country, we've had a few drought years. We're high elevation and high desert country. We actually, at times, have, in some parts of our total land mass, have listed the white-tailed deer as endangered. I wonder how you would feel if that happened to you tomorrow.

And number two is we grow Junipers in eastern Oregon, as well, and reading your comments and hearing that you've cleared all this beautiful land and now you have an abundance of lark—as you know, Junipers take several hundred gallons of water a day in order to survive. And under the new laws that are being promulgated today, I wonder if you'd feel the same way if you could not clear the land that you previously have cleared.

[Applause.]

Mr. BAMBERGER. That's a good question. I appreciate it and I'm going to make the statement that there is absolutely nothing that I've done over these past 27 years that I could not continue to do and do today, even if I were starting over under the existing regulations.

[Applause.]

Mr. COOLEY. And the last thing I'd like to ask you about. You talked about this wonderful bird called the Blue-Footed Booby. You know, I think that the Environmental Protection Agency did an injustice to this bird because a lot of thousands of people that came out and looked at this bird all by itself might have disturbed its habitat.

[Applause.]

Mr. COOLEY. I think they might have flawed here. I think they should have kept people miles away so that little bird could have been properly protected.

Mr. BAMBERGER. This wasn't traditional habitat. He got a lightning strike on the brain. I think he suffered from——

Mr. COOLEY. So if the species is not in the traditional habitat, we should not protect them?

Mr. BAMBERGER. I don't think an answer is—long-term survival of any species. Just to cage them up or pen them up or protect them in one little spot, that's not going to get the job done. And nature doesn't set boundaries, sir. It is not a boundary of a highway or a fenceline or a property line. The boundaries are natural areas that they—

Mr. COOLEY. I don't disagree with that, but I think when we look at this Act, maybe others will try to set boundaries.

Mr. BAMBERGER. Yes, we are. We've done it with our own fences and highways, et cetera.

Mr. COOLEY. And you said that you felt that we were too many people in the area for too much habitat and overgrowing the population. When they give out the pills, are you going to be the first one in line?

[Laughter.]

Mr. BAMBERGER. Sir, at my age, you don't take pills.

Mr. COOLEY. I just thought of it as an approach to the problem.

Mr. BAMBERGER. I want to add one thing, Mr. Merrill. I have been awarded the Society for Ranching Management's Excellence Sign. It's inside my gate and I appreciate that very much. I also received the Governor's Award for Environment 2000 last year.

[Applause.]

Mr. BAMBERGER. And I also received from the university one of six awards given in the entire state for their individual contributions to conservation to the FFA students of this state, the Scot Award for the Individual Conservationist of the Year in the State of Texas last year, and many, many, many more. And I think that it's a compliment to the citizens here in Hill Country that you're here and I think you'll be complimenting us and all the citizens of this country if you keep this item on the agenda and make some of these changes. But, please, oh, please, keep it alive in this country.

[Applause.]

Mr. BAMBERGER. It's Germany, it's Canada, it's the U.S. where we have laws that are working. Somebody mentioned Russia. Hell, it ain't working there. Go to Mexico. Hell, it's not working. They don't have laws to protect things and save things.

[Applause.]

Mr. COOLEY. Thank you. Mr. Hood, I'd like to ask you one question. When you hired the biologist to prove certain information that was requested under the Endangered Species Act, why did you do that? I mean, why did you hire the biologist? Isn't that the responsibility of the agency to prove that this is an issue and it shouldn't be on your back to financially provide them information?

Mr. HOOD. Well, it's kind of the way the Act is written, but the Act doesn't enforce it at all. That's part of the problem. I had the opportunity to work on the BCCP since its inception really and fairly recently, the Secretary has come down with some pretty sweeping changes in interpretations. But that's only one administration level. So that's why some of these changes that we're talking about today for the Act have to be made law. They have to be enforced.

I had to hire it to prove to the Fish and Wildlife Service where the birds were or were not. And we found that, unfortunately, the

way that I had been developing the property, which is leaving all the hillside in its natural state and leaving the valleys in the natural state, putting homes on the top of the hill, was conducive to the increased population of the birds, and they were everywhere. There's no question about it. But they were in the backyards of homes that had been there for four or five years. So, yes, it should have been someone else's responsibility, but no one else was going to do it.

I've just got a bit of history and I'd like to point one thing out as far as all the listings. We talk in terms of—some of the early settlers, 150 to 200 years ago, used to report that the land here as all grasses with a few trees and little wood. All right. If that's really the case and the cedars weren't here and the Service is telling us that both the Black-Capped Vireo and the Golden-Cheeked Warbler need to have the cedars for survival, has this been an evolutionary process? The Black-Capped Vireo nests about five or six feet off the ground and probably it's biggest threat is the cow bird, the fire ant and raccoons, to its demise.

That seems like it's kind of a natural evolutionary process. Maybe we need to, in the process of listing, to go back and historically see how long has it been here, because if they needed cedar to exist 200 years ago, these birds probably weren't even here. Yet, now, we have to protect them because they're in the process of moving through and they're only here four or five months out of the year.

I realize I expanded that, but I had to get that in.

[Applause.]

Mr. COOLEY. Mr. Brandes, I really found your comment very interesting because we in the northwest are facing the same problem on the Columbia River with the Endangered Species Act as far as the salmon is concerned. I want to make it for the record and for you to understand that you're not only, in Texas, having the problem. In the northwest, we have spent two billion dollars in mitigating the salmon and we have not mitigated one single fish. It's time and time they have proven that.

We're going to have a power increase of ten percent to all of our agricultural users probably next year because now Marine Fisheries says since we've spent two billion dollars, we haven't mitigated the salmon because we've only been spending 350 million dollars a year and that's not enough money. So now they're going to go to half-a-billion dollars a year in order to mitigate the salmon.

Now, I just wanted to point out to you that you're not the only one that's looking at this situation and saying this doesn't make any sense. And in other places in the country, we're having the same kinds of problems. They're having the same problem in Louisiana and other places. I just wanted to say that you're not in this thing alone. We all realize the problem, the science is flawed and we need to bring it back under control.

Mr. MERRILL. I'd like to make a brief comment on that. Secretary Babbitt is on record as saying that, one, the Federal Government is not going to provide any more funds to us, but other than that, he made the comment that the Texas Hill Country and Texans are well able to fund a solution to this problem down here. That was in the newspaper report a year or so ago.

And the simple fact is we can't fund it. The numbers are too huge. Local communities and landowners can't do it. So the Secretary is just totally wrong and that's misinformation that he's putting out to further a broken plan, in my opinion.

Mr. COOLEY. Actually, it's additional taxation without any Federal aid to you.

Mr. MERRILL. Exactly.

Mr. POMBO. Ms. Chenoweth.

Ms. CHENOWETH. Thank you, Mr. Chairman. I do want to say I, too, am from the northwest where we have the salmon listed. It's very interesting that the Sockeye Salmon has the same gene pool that is in the can of salmon that we can buy on the grocery shelves, and that they're trying to protect in the rivers there. I don't say that to make light of what's happening. I say that because we're not taking the law seriously.

Any law Congress passes should be taken seriously. And I don't think we should ever list a species when the law says that one can never harm, harass, injure or kill or sell for commercial purposes an endangered species. That's happening broadly across this nation because people choose not to apply the law equally with regard to the case of the salmon or from property owner to property owner, which brings me to Mr. Bamberger.

I am so interested in what you have done. You say that your ranch had no water, no grass, and basically no wildlife. And for the past 27 years, you have worked that land, so now you have an abundance of all three.

Do you have any pumping or irrigating acreage out of that 5,500-acre ranch?

Mr. BAMBERGER. No, ma'am. I don't even have a working water well.

Ms. CHENOWETH. OK. I am interested in your comment, though, that you said you would do over again today what you had done in the past. And I'm confused because the Ashe Juniper is the critical habitat for the Yellow-Cheeked Warbler.

Now, under the law, the consistent application of the law, if you were to do today what you have had people do or you did yourself—did you clear that land yourself or were you still the owner of the Church's Chicken, Church's Fried Chicken?

Mr. BAMBERGER. No. I did that myself.

Ms. CHENOWETH. That's commendable, because many people in Texas have had to clear their own land. But wouldn't that be a taking under Section 10(a)?

Mr. BAMBERGER. Not really. That's where a lot of the confusion comes in. The gentleman to my left said that for the Black-Capped Vireo, the Juniper is not his habitat. The Golden-Cheeked Warbler, it is. And Juniper is a native tree. It was here for years and years, hundreds and hundreds of years. It was back in canyon areas, on the sidewalls of steep canyons. It was more or less of a rare tree that was used quite a good deal when the settlers first came here because of the aromatic wood and because of its hardness.

The spread of the Ashe Juniper, the cedar that we call it here, has come about because of overgrazing, because of the suppression of fires, because of droughts and misunderstandings, as Mr. Merrill said, in the past. What I cleared on my ranch was none of these

grand old 50 to 100 to 150 year old cedars. As for this poor little old bird, there's probably enough nesting material on one tree on my 5,500 acres to take care of every Warbler there is.

What I cleared was just wall-to-wall Christmas trees that have infested the Hill Country of Texas, they shade out the grass, they suck up gallons and gallons of water—take ten to 15 gallons of water a day out of the earth and it has suppressed all other plant activity. When John talks about having to round up cattle through a cedar break, I don't know how in the hell you even ride a horse through a cedar break, because it's so hard on the face and everything else.

So when I say I'd do the same thing today because what I cleared, and that's where the misunderstanding is, is not Golden-Cheeked Warbler habitat. And the reason the Golden-Cheeks are there now is he also has to eat insects and caterpillars and he has to have a drink of water. And now the grass is on the ground and when it rains, the water goes into the ground, it hits a clay bank or it hits a rock shelf, and I have 14 flowing springs on the ranch now that have been cased off and supply all the water for five employees, for 250 head of cattle, and for all the wild creatures, as well.

[Applause.]

Ms. CHENOWETH. Thank you, sir. Thank you. Ms. Rector, I wanted to ask you. Is your land located near prime Warbler habitat or is it zoned industrial or was it zoned industrial or is it in an industrial area?

Ms. RECTOR. My land is in an industrial area. My almost next door neighbor is 3M Company, a very huge research center. Down the road from me is the largest oil well servicing company in the world. Down the road further is a newly—in the process of being built Lakeline Mall, which covers several hundred acres. My land is fragmented with growth development all around it.

When asked if I had offered it to the Nature Conservancy, by letter, they wrote me and said it's too small, we don't want it. It's too small, we need bigger tracts. OK. They don't want it, I can't sell it, I can't use it, so I am really in a predicament.

Ms. CHENOWETH. Well, I think your testimony and Mr. Hood's are very compelling and I hope that under the new Supreme Court ruling in *Dolan v. the City of Tigard*, out of Oregon, where the Supreme Court ruled you could be compensated for devaluation of your property or a taking, I hope someday you can be.

I did want to ask Mr. Brandes, very quickly. Could you explain a \$50,000 loan from the Nature Conservancy with regards to a referendum that occurred here in Austin?

Mr. BRANDES. Well, basically, it was Proposition 10, which was a city referendum to sell 22 million dollars in bonds to acquire land from the Balcones Canyonland Project. The Nature Conservancy basically funded the pro side of that election. That was the bulk of the funds that went into advertising and whatever for that election. They had an enormous conflict of interest in the outcome of these elections because they were basically the land brokers. The Nature Conservancy is the Federal Government's land broker, for all intents and purposes.

And if you ask me, they bought the election. And I don't think that any beneficiaries of the outcome of the election should be allowed to do that sort of thing. They need to be reigned in. Whether it's legal or not, I don't know, but they had an enormous—

Mr. BAMBERGER. That particular election was lost by the Nature Conservancy.

Mr. BRANDES. No. The 22 million dollar one was won.

Ms. CHENOWETH. Thank you, sir. Thank you, Mr. Chairman.

Mr. POMBO. Thank you. I'm sure we will be hearing more about that. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman. I appreciate the testimony of all the witnesses on this panel and as a member myself of the Texas Southwestern Cattle Raisers Association, I appreciate Mr. Merrill being here. And like Mr. Stenholm, I appreciate the suggestions that you gave us on ways that the Act needs to be changed.

I think that most folks can pick up—the folks and the members that are here—that we need to make changes in the Act, but it's important for us to have a record and to talk to people who have been affected by this Act, to make a record for the changes that need to be made. It's also important for this Task Force to have these hearings around the country and hear how endangered species are affecting different parts of the country. And it is particularly important, I think, to have suggestions on what we need to do to change endangered species.

I want to focus on one of those, Mr. Merrill. We talked in the previous panel particularly about voluntary incentives for landowners and rather than have regulatory mandates, where landowners are afraid of the government and afraid to have any habitat, afraid to see any species, do something in a positive way that gets landowners working with us.

I noticed yesterday, of course, the Texas Public Policy Foundation released a proposal that is a market-oriented approach where you have certificates that could be bought and sold as one way to do it. But I'd like for you to comment on this—on some sort of voluntary incentive approach, would that work—would it be effective? What are the benefits that you see?

Mr. MERRILL. The least expensive of all would be an extension of what I mentioned a while ago, and that is removing the disincentive. Mr. Bamberger has an excellent idea and it's proven in practice. If I may use the parallel of huntable species, like quail and white-tailed deer, which we lease access to here in the State of Texas, has become a major income force and the wildest-eyed environmental wildlifers you'll find in Texas are the ranchers who are able to use these private land leases.

Were we free to do that with endangered species—that is, simply remove the disincentives—then I can brag that I had this or that or the other, invite people there. I've had the Audubon Society out to our ranch. I had to stop them from coming, our Boy Scouts, which I love dearly, and other people like that. At the present state, we can't invite anyone on the ranch who might see something fly over or light because it locks us up.

So if the disincentives are removed, then they are no longer a liability. They become an asset and it gets away from the use of tell-

tale "I saw one on your place, sic 'em," which I never thought I'd see our country come to.

Mr. THORNBERRY. Let me address that. I've got an AP story from earlier this week where a memo was found in the Consolidated Farm Services Agency, it used to be ASCS, where they agreed to provide the EPA with information about crops planted in an area that may be near endangered species. And the memo says because of the confidential nature of this information, don't tell the land-owners about this request or the potential location of endangered species.

So it makes your CED or your ASCS office a spy for the EPA to come in and look for endangered species. That is exactly the threat of big brother government that we're all here to try to prevent.

[Applause.]

Mr. MERRILL. Mr. Thornberry, I rest my case.

[Applause.]

Mr. THORNBERRY. Let me ask you one other question. I think Ms. Rector's comments on property values is very important, but how about in the agricultural area, Mr. Merrill? It's one thing if Ms. Rector wants to sell her property, and obviously we can see how lower property values affect her. In my family, we've had property for five generations. We have no intention of selling it, but doesn't lower property values affect us, too?

Mr. MERRILL. Absolutely. In the first place, most of us who are in the ranch and farm business borrow money and most use that land base as their collateral and if the value of the collateral goes down, your lending—not your lending company—your borrowing ability goes down with it, and that's part of what I addressed in my original remarks. And not only that. The collateral, if you please, for all of the county and the state and other taxing agencies that depend on that property base to do all the things we need to do for public schools and all.

So it's very, very far-reaching. It's much more than an individual landowner issue.

Mr. THORNBERRY. Thank you.

Mr. POMBO. Thank you. Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. John, you seem to be bearing the brunt of most of our questions here today, but let me start off by thanking you and the other members of the Texas and Southwestern Cattle Raisers Association for your help in blocking the designation in all 33 counties in the Hill Country and making sure that the government backed out and did not designate those counties as critical habitat for the Golden-Cheeked Warbler.

[Applause.]

Mr. MERRILL. If I may, I would thank our Congressmen and Mr. Stenholm and those who held hearings up and down this area to help us get that done. So we're mutually appreciative.

Mr. SMITH. As you know, John, this is the pamphlet that started the range war in the Hill Country. This is the pamphlet that the Fish and Wildlife Service mailed out, mapping the 33 counties they were possibly going to be designating as critical habitat.

I know and I think that you know that the reason they changed their mind was because they felt the political heat. We know where their hearts are and we know where this Administration has tried

to go in the past with their National Biological Survey, where they would allow individuals to come onto private property without permission and so on.

My point is that since this was—since they backed off the designation of these counties because of political heat, I think it's up to those of us in this room, those of us who are listening to the hearing to keep up the political heat. As you know the old saying, if they don't see the light, make them feel the heat. I think that's what we're going to have to continue to do and not rest, but continue to monitor the situation.

Mr. Chairman, one of the drivers of today's hearing, I think, is shown by this panel today, where you have real live examples of the unsung American heroes of today who have suffered terribly as a result of environmental regulation and other regulations.

We heard about Ms. Rector's—the value of her property going from 900,000 to 30,000, Mr. Hood almost going into bankruptcy and so on. And I think it's important for this panel to collect—I hate to use this term—but to collect these horror stories so that we can relate these horror stories into changing the legislation and to fixing the Endangered Species Act and hopefully preventing a lot of this legislation that's even on the books and being enforced to begin with.

Mr. Hood, I want to go to some of your prepared testimony and point out a little bit more detail that I think you have a chance to—another example of the kind of thing we're talking about today. This was the case of the Krugers in Travis County that you mentioned. This is a couple and I want everybody to appreciate the extreme example or the extreme measures that the Fish and Wildlife Service are now taking today.

This is a couple who wanted to build a house in Travis County, and on the lot there was nothing, no wildlife, just dirt and dumped cement, except for one scrub tree. The couple went to the Fish and Wildlife Service to get a permit to build on this property and because of that single tree, they were denied a permit to build in Travis County. They tried to appeal. It cost them 15,000 dollars. They had 40,000 dollars tied up into the law and the government now says that they're not going to compensate you because you can still use the property, because you can still camp out on it.

That, Mr. Chairman, is not the intent of the Constitution and that's why so many of us are fighting so hard to try to get individual landowners compensated for the lost value of their property. Now, I want to give one other example that hasn't been brought up today. This is also in my district. As I mentioned a while ago, my district is—19 of my 21 counties had been listed as a possible habitat for endangered species of one kind or another, Golden-Cheeked Warbler or otherwise.

In Williamson County, right north of Travis County, we have a situation where there is a high school that has been on some property for 15 years. The number of students, the number of kids going to this high school has increased 50 percent in the last several years because of the growth in the area. This school wanted to add on to the existing building and were forced to spend 100,000 dollars in environmental studies because a Blind Cave Spider had

been found in the area. And they still don't know whether they're going to be able to add on to this high school.

But that is how ridiculous some of these environmental restrictions are. In this particular instance, as I say, the entire school, the children are suffering. When we talk about a few thousand dollars, that's still the taxpayers' money. It's not the school district money. It's still coming out of the pockets of the taxpayer.

So these examples are just the kind we need, Mr. Chairman, to take back to Washington to convince our colleagues.

With my time almost up, I want to go real quickly to Mr. Paulson. You're an environmental consultant and I'd like to see if this isn't true. I have been told that when it comes to critical habitat, that critical habitat can be designated even—for example, we'll take the Golden-Cheeked Warbler that you talked about—even if the Golden-Cheeked Warbler has never nested there, even if the Golden-Cheeked Warbler has not been or currently, never been there, you can still designate that, can you not, as critical habitat just because someday they might nest there?

Mr. PAULSON. Yes, and that is Fish and Wildlife's interpretation of the law. It gets down to what is habitat, how you define it. Originally it was defined as 75 percent can be covered. They expanded that to 50 percent. And now there's a map out there that had a broad-brush painted which indicates it doesn't have a Golden-Cheeked Warbler on it.

Mr. SMITH. That wasn't originally the intent of the Endangered Species Act. It's supposed to take into consideration economic impact as much as anything else. We need to get back onto the original intent, but I think the members of this panel are committed in the next year—if we can't restructure it entirely—certainly amending the Endangered Species Act to bring in some common sense, to bring a balance into the equation. We're clearly out of that balance and there's no common sense now in many instances where it's being enforced.

Thank you, Mr. Chairman.

[Applause.]

Mr. POMBO. Thank you. Mr. Bonilla.

Mr. BONILLA. Thank you, Mr. Chairman. I'd like to just associate myself on this brochure of the critical habitat of the Golden-Cheeked Warbler. We're hoping to make that a collector's item one day. I'm sure you read the passage in here that recommends that if your cats on your property, that you should put bells on their collars just in the event that the Golden-Cheeked Warbler might be flying over at a particular time.

I think that really illustrates the ridiculous philosophy behind this effort. But I thank you for your efforts and I thank everyone on the panel for coming to testify today. The information you have provided is extremely useful.

Ms. Rector, I'd like to start with you, if I could, because your testimony here today reflects a story that has been heard nationally now. I don't know if everyone in the room recognizes your hard work on private property issues. We've read about this in Washington and in national publications and it's certainly a tribute to you for never giving up. And I know that it looks bleak and looking at your testimony here and the devaluation of your property, it is sad

to see what has happened to you. But I just hope that you stick with us and hopefully the legacy that we'll all leave behind someday will be one of a better regulation that we can all work with, for someone like yourself, who invested early in life to try to have a place to retire is not suddenly seeing themselves having the rug pulled out from under them like you have.

I want to ask you. I was interested to hear Mr. Bamberger's remarks earlier about—I think the words were that humans were overpopulating too many areas now. I wonder, Ms. Rector, as a single woman, 74 years old and retired, are you one of those people?

Ms. RECTOR. Absolutely not.

[Applause.]

Mr. BONILLA. And just one final question, Ms. Rector. You talked briefly about how Mr. Hamilton from the Fish and Wildlife came out and inspected your property firsthand. How helpful was the Office of Fish and Wildlife overall in helping you with your problem?

Ms. RECTOR. Very unsatisfactory. I hate to say this, but calls repeatedly go unanswered, and letters that I have written—and I have made a—every six months, I would write to them and say, hey, has there been any change in my property, can I do anything. It takes about six weeks to get a letter.

When I call the office, I get the girl who answers the receptionist phone. That's as far as I ever get. It has been very frustrating.

Mr. BONILLA. Do you get the sense at all that some of these bureaucrats—do they ever care about you as a person, care about your life?

Ms. RECTOR. I don't believe so, no. I don't get that feeling that they are supposedly there as servants of the taxpayers. I don't feel that at all. I feel that they have been less than helpful.

Mr. BONILLA. Ms. Rector, again, to you and every member of the panel, we appreciate your testimony. It's very helpful.

Ms. RECTOR. I hope I live long enough to see this thing settled.

[Applause.]

Mr. POMBO. I would like to thank this panel very much for your testimony and your answers to our questions. It will be very helpful in the coming months as we look at how we reform this Act, the things that we've heard here today. Thank you very much for being here.

[Applause.]

Mr. POMBO. I would like, at this time, to call up our next panel. The panel consists of Wilma Anderson, Bob Currie, Wayne Wyatt, and Dr. Wallace Klussman. While the panel is being seated, I would also like to ask that if Peter Schenckan his here, he may also join this panel.

Please take your seats. We will start with Ms. Wilma Anderson. Ms. Anderson, you can go ahead and get started. If you would please take your seats, again. Ms. Anderson.

STATEMENT OF WILMA ANDERSON, EXECUTIVE DIRECTOR, TEXAS SHRIMP ASSOCIATION, ARKANSAS, TEXAS

Ms. ANDERSON. Mr. Chairman, members of the Task Force, my name is Wilma Anderson, Executive Director of the Texas Shrimp Association. Our association represents vessel owners, direct and indirect shoreside facilities, and other related businesses to the in-

dustry. We are affected under the Endangered Species Act with our interaction procedures.

The Endangered Species Act was originally intended to protect the species. The Act is now so overlaid with species and subspecies that it is impossible for that amount of species to coexist. The Act has no economic deterrent factors as a safeguard for the industry or the private sector. The Act only helps to safeguard the environmental communities, environmental attorneys, who are the constant winner in a Federal Court.

Economics has to be incorporated and it has to be part of the equation. The reauthorization of the Endangered Species Act must have amendments that curb the abusive use of the Endangered Species Act on industry and the private sector.

These field hearings are extremely important. It allows you, as decisionmakers, to hear directly, tour the area, meet the people, and see the effects the Act is now having on the industry and private sector today. I want to thank the Task Force for taking the time to be here and to see us all in south Texas—mid-Texas.

I realize my written statement is very lengthy and it has been entered into the record. Therefore, I will not read it, but would like to come to another issue just briefly to give you a background of the shrimp industry in Texas, for you and the people in the audience today.

The U.S. shrimp industry is the most valuable fishing in the United States and Texas and Louisiana represent 80 percent of that value. In the Department of Commerce yearly public listing of fisheries in the U.S., it lists 60 major ports. Of those 60 ports, 24 are from the Gulf of Mexico.

The industry is comprised of two different fisheries—Bay and Gulf. In Texas, both industries provide over 30,000 jobs, base payroll of 326 million a year, with an economic value to the State of Texas of 600 million. The progress or the hub of the industry, any environmental regulatory impact on the trawlers impacts the direct and indirect savings of the industry to the consumer level, lending institution portfolios, in addition to local and state funds.

Shrimp must be managed and harvested different than any other fishery. It has a one-year life cycle. It is not like other fisheries or industries. It is yearly and if not harvested, the resource revenue is lost through natural mortality of the species. Under the managing and harvesting aspects of the species, naturally we become highly concerned because it severely impacts the crops.

Therefore, we strongly support incorporation into the Endangered Species Act legislation now being considered by Congress to reform the ways the Federal Government develops and implements regulations. We support proposals to require cost-benefit, risk assessment and peer review. And as I stated in my written statement, the Texas vessels are impacted nearly 30 percent shrimp loss from the use of TEDs, turtle excluder devices.

In Texas alone, the effects of the TEDs regulation since 1990 on the shrimp industry has incurred millions of dollars in lost revenue each year. There has been a long history of conflicts between the shrimp industry, government and environmentalists pertaining to sea turtles and the stringent regulations implemented under the Endangered Species Act. There have been constant filings by the

environmentalists under the Act through letters of intent to sue the U.S. Department of Commerce for failure to protect sea turtles and enforce the Endangered Species Act pertaining to shrimp trawling as the major cause of sea turtle mortality.

These suits and threats have led to ever-increasing Federal regulation enforcement and seizure of our catch. TED regulations were issued June 29, 1987, December 4, 1992, July 9, 1994, and the industry now prepares to counter a more stringent proposed TED regulation than in the previous three rulemakings combined from the 1994, November 14 filing, relating to the 94 sea turtle strandings on the Texas coast.

I noted in my statement that we have requested NMFS publish immediately all those aspects of the November 14 biological opinion that are subject to rulemaking under the APA, including the elements of the emergency response plans, which was one of our major concerns.

Mr. Chairman, there has already been an important aspect of these hearings. Upon filing of TSA's written statement to the Task Force and Committee and, out of respect, to the government agencies, a copy of my statement was sent to the Regional Director of NMFS. Ironically, after months of industry requests, my statement was received March 16 by the Regional Director. I immediately received by fax the plan. We were devastated. We are totally concerned that it's the most stringent regulation that could possibly come down.

After review of the ERP, we believe NMFS has again erred in conservation judgment, which would be imposed in a stringent suppressive regulation upon the Gulf of Mexico shrimp industry, whereby failing to fully address other contributing factors to sea turtle mortality.

The ERP views the sea turtle strandings as the driving factor leading to certification, closures of fishing areas of Louisiana and Texas, increased enforcement and catch forfeiture. This approach is devoid of any incentives to the industry, who has solely carried the costly burden of sea turtle protection since 1990. Strandings are increasing because the population of turtles is increasing.

The Texas Shrimp Association has employed a firm of professionals and is preparing a more feasible protection plan. Our draft is not complete, but it contains appropriate protection for sea turtles without an overkill impact on just the shrimp industry. It established a sea turtle conservation zone, redirects fishing efforts, provides incentives to the shrimp industry, who bears the greatest impact from the establishment of the conservation zone and stipulates other user groups within the conservation zone must share responsibility with the shrimp industry to protect sea turtles.

Mr. Chairman, as stewards of the specie, we simply want to be heard by the resource agency and be allowed to help with developing a workable plan. Thank you.

[The prepared statement of Wilma Anderson may be found at end of hearing.]

Mr. POMBO. Thank you very much. Mr. Currie. The point has been raised that we're having a hard time hearing up here. So if you could keep it down a little bit, please. Thank you. Mr. Currie.

STATEMENT OF BOB CURRIE, KENNARD, TEXAS

Mr. CURRIE. Thank you, sir. By the way, Mr. Chairman, I, too, suffer from color blindness, but I realize now when the little light on my right goes out, I'm supposed to go off.

Mr. POMBO. I'm color blind, too, but I'm glad you figured that out.

Mr. CURRIE. Mr. Chairman and members of the Committee, I consider it a distinct honor to be here today and to address you. I'm Bob Currie, of Kennard, Houston County, which is in the Pineywoods of east Texas. I'm a private forest landowner, Coordinator of the Texas Logging Council, and lifetime member of the Texas Forestry Association.

Having suffered substantial adverse economic impacts of the Endangered Species Act, I submit the following actions and decisions triggered by the Endangered Species Act which caused severe losses to the Curries, yet did little, if anything to enhance habitat for endangered species. As a non-industrial private landowner, I was forced in 1991 to harvest a tract of sawtimber, which my wife and I had intended for retirement income beginning with my 65th birthday, which will occur in July of '99.

As a result of administrative appeals and court challenges to management decisions of the United States Forest Service, some stands of trees on the Davy Crockett National Forest have become overstocked and overmature. While these court-ordered conditions were created to improve habitat for the endangered Red-Cockaded Woodpecker, they were, in fact, ideal habitat for the Southern Pine Beetle. Having lost about 55,000 board feet of timber in 1990 to the Southern Pine Beetle, which migrated onto our timberland from the adjacent national forest land, we followed the advice of professional foresters and harvested the bulk of our remaining stand years earlier than we had intended rather than risk losing the entire standing inventory if we didn't harvest.

Another factor that triggered our decision to harvest, our timber included many trees more than 75 years old which were, we're told, ideal for Red-Cockaded Woodpecker nest trees. Having already suffered a big loss from the Southern Pine Beetles, which I believe were allowed to breed and increase through misguided public policy, I was financially unable and totally unwilling to forfeit additional timber to the Red-Cockaded Woodpecker.

While we were unaware of any colonies of Red-Cockaded Woodpecker residing in our trees, we decided to harvest before any turned up.

Attempts to pass anti-harvest legislation have failed every year since the mid-'80's. We don't have any laws prohibiting timber harvest, that I'm aware of. What we do have is exploitation of the Endangered Species Act to prevent harvest.

As a service vendor, I have been punished by the Endangered Species Act. In 1960, I founded a business doing site prep for reforestation projects and later building access roads for both industry and the national forest system. Through hard work, with emphasis on good quality and total reliability, we built a family enterprise that in 1980 provided good jobs for 14 people. Because of special interest pressure to reduce timber harvest, under the guise of Red-Cockaded Woodpecker protection, Currie Construction income di-

minished each year since 1985, from five to 15 percent, to a point where today's income from that enterprise is less than 25 percent of 1986 income.

Instead of 14 good jobs, Currie Construction today has only three full-time employees who earn less today than they did five years ago.

As a taxpayer resident of a national forest host county, the Endangered Species Act has penalized me by reducing payments in lieu of taxes from timber sales for the county schools and road system. Since county and school operational costs have increased, ad valorem taxes have snowballed. We're hit with a double whammy—ever increasing local taxes which have to be paid from a work opportunity made smaller because of regulatory exploitation of the Endangered Species Act and other Trojan horses of similar pedigree.

As an overloaded taxpayer, I have plenty of company. Not just loggers and forest road builders or tree growers, not just farmers, ranchers or food and fiber processors, it's every consumer of food and fiber and shelter in America paying this tax. Call it the owl tax or the woodpecker tax, call it the Golden-Cheeked Warbler tax. Call it whatever you want to. The truth is every single wood-based product from two-by-fours to toilet paper has—the costs have increased substantially because of the Endangered Species Act mandates, which do little or nothing to benefit threatened or endangered species, but which reduce or eliminate other actions totally unrelated to the declared intent of the law.

I don't know about other lawsuits, but in the ones I've been involved with, plaintiff lawyers have been paid with tax dollars. The Equal Access to Justice Act pays up to 200 dollars per hour for lawyers, that I'm aware of, that have sued us in east Texas.

This situation illustrates what many have called the perverse incentives of the Endangered Species Act. Under current law, a small landowner like me has nothing to gain and a whole lot to lose by having a Red-Cockaded Woodpecker or any other endangered species on his property. This includes land uses, knowingly or unknowingly, that violate the Endangered Species Act. Consequently, we are forced to make our private property inhospitable for these creatures fearing land use controls, reduced property value and possible sanctions.

Sir, I have the written statements there in your presence, so, if I may, let me just go to the last paragraph of my statement so I don't have to quit on that light.

What we have at issue here is truth and honesty. I would love to see all of us state what we really want and then say what we really intend to do, with both hands on the table, so there can be no hidden agendas.

Man and other species are a whole lot more compatible than some folks would have us believe. I practice good stewardship, not just with natural resources, but with people, my neighbors. My dad found a good way to determine if something is right or wrong by simply asking would the world be a better place if everybody did this. And I sure would like to suggest and my only recommendation to this panel is that we apply the Pole Currie test to the reauthor-

ization of not only the Endangered Species Act, but any other legislation you might consider.

Thank you, sir.

[Applause.]

Mr. POMBO. Thank you very much. Mr. Wyatt.

STATEMENT OF WAYNE WYATT, MANAGER, HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT, LUBBOCK, TEXAS

Mr. WYATT. Mr. Chairman, members of the panel, thank you very much for coming to Texas. I have gained a great deal of respect for you last night and today, your endurance is beyond, I guess—well, it's great. We appreciate you sitting here listening to us.

My name is Wayne Wyatt. I represent the High Plains Underground Water Conservation District. This is an undergroundwater conservation district that covers about 15 counties, all or parts, in the high plains of Texas between Lubbock and Amarillo. Mr. Thornberry represents us well and we're very pleased to have him on the panel and as our representative from the area.

The Endangered Species Act—I would like to, I guess, say a little bit about endangered species. I believe we have all been brainwashed. I believe that we just assume that species are endangered. Anytime people mention a species and make reference to it being endangered, we accept that. Our children are being brainwashed to the fact that species are endangered when, in fact, many are not. So with that said, I think that we need to back up and defeat or try to overcome some of the rhetoric that's going out in the public schools and in the communities about species being endangered and giving the assumption that every species is.

I'd like to add to that by saying that Andrew Sampson, who is our Executive Director of the Texas Parks and Wildlife here in the state, he made a statement before the Agriculture and Wildlife Committee, Texas House, that wildlife had never been more abundant in the State of Texas than it is right now. He made this statement a few weeks ago. And he did say there were exceptions that we needed to pay some attention to, but all in all, wildlife had never been more abundant than fish and wildlife have, and I appreciate that very much.

We in the High Plains of Texas have recently been attacked by the Endangered Species Act by the proposed listing of the Arkansas River Shiner, which is a little two-inch minnow in the Canadian River which crosses the panhandle. When we received notice of this, and we really didn't think it was a fair notice, it was published in the **Federal Register** and we only found out about it through that source, through Senator Graham's office.

But it should have been listed in the local newspaper, and I think that's one of the changes that needs to be made. If we have a creature that is being listed as threatened or endangered, people need to be notified locally. Secondly, when we received that notice, we got a copy of the Endangered Species Act, the amendments thereto, and, the best we could, the rules and regulations that the U.S. Fish and Wildlife Service operates under, and we found it to be atrocious, quite frankly.

Number one, anybody in the whole world can petition for a species to be listed as endangered and they really don't have to have any scientific evidence at all. I think that needs to be corrected. Number one, we shouldn't have such easy petitioning that a species be listed as endangered. Number two, if one is listed as a proposed rule in a sense, the local people need to be notified. And, number three, they didn't even have to have a public hearing unless we petitioned that they do so. We did that and then they didn't notify any that had petitioned that we had the public hearing. So we only got notice—I only got notice that the hearing had been set one week prior to the date of the hearing.

And many of them, including Senator Graham and several of our local representatives, Senator Bivens, Representative Smithey, and Representative Swinford, which represents the area, they never received notice either prior to the date of the hearing. So I think that's atrocious that they would act in such a light.

In the proposed rule, they have extensive reference to habitat and the effects that a groundwater pumpage would have on the stream flow of the Canadian River. And it was all wrong. But, nevertheless, in the proposed rule, we could not address those, as we were told, we should not address them, we did, but, nevertheless, they said that any addressing of the habitat or critical habitat would have to come later after the proposed listing was done.

And all we could address that they would pay any attention to was the biological and commercial data, commercial meaning if they're saving the dern minnows and we do have a little harvest of the minnows. But, nevertheless, that's all that they would consider. And we looked at all the habitat data even though they used it extensively and they said that our pumpage of the groundwater was causing reduced flow of the Canadian River.

All of our geologic and hydrologic data disproved that and we had the state people, Texas Water and Environment Board and others, their good scientists in this area, to testify to that fact. But even more important, the Texas Parks and Wildlife, their survey data showed, in fact, that these species in the Canadian River in Texas was thriving, that it was not, in fact, threatened or endangered. They did not recommend a listing and we appreciate that very much.

The Federal Fish and Wildlife people came back to us and they said, well, they said because they knew the species is—it is thriving, it is not endangered, but it's the only thriving population, if we got one catastrophic accident, it might kill them all. And this is not true. We have a dam on the Canadian River which separates the two populations. We have a third population in New Mexico in the Pincus River and it's thriving and doing well, but they say it's an introduced population and they won't even consider it. But, yet, they're proposing a recovery plan to try to do this sort of thing.

So the whole system is screwed up and it is real ridiculous to us. But we would suggest that maybe it might have some merit, the Endangered Species Act. I supported the Endangered Species Act in the beginning. I was naive. I thought all we were trying to do was to protect the American Eagle, seals, maybe grizzly bears, some of the real species that were important, but, nevertheless, I was wrong.

In my written testimony to you, I have offered a suggestion that we only look at keystone species and that we require the Federal Fish and Wildlife to make surveys to find out if, in fact, that there are keystone species that are important to society and that they do recovery plans before they're listed and that they make proper restitution or pay for any loss of private property or modification of private property and all this sort of thing.

I tried to lay that out the best I can. I thank you very much. The red light is on.

[Applause.]

[The prepared statement of Wayne Wyatt may be found at end of hearing.]

Mr. POMBO. Thank you very much. Dr. Klussmann.

STATEMENT OF WALLACE KLUSSMANN, TEXAS WILDLIFE ASSOCIATION, FREDERICKSBURG, TEXAS; ACCOMPANIED BY DAVID K. LANGFORD, SAN ANTONIO, TEXAS

Mr. KLUSSMANN. Thank you, Mr. Chairman, members of the Task Force. I am Wallace Klussmann and I do sincerely appreciate this opportunity to present testimony on the Endangered Species Act. I applaud your interest in our wildlife resources and I believe it's both appropriate and definitely needed.

I am here to represent the Texas Wildlife Association and the Hill Country Heritage Association. I am accompanied by David Langford, on my left, the Executive Director of the Texas Wildlife Association.

I am a wildlife scientist. I have more than 30 years of experience. I retired from Texas A&M University in 1993 as Professor and Fish and Wildlife Specialist Emeritus. I now reside on a small ranch in Llano County.

I consider myself a practicing ecologist and a practicing environmentalist. Nothing is more important to me than the wildlife resources in this state and nation and everything I have to say to you today keeps the well being of wildlife as a high priority.

I have outlined the problems that I see in the implementation of the current Endangered Species Act in my submitted written testimony and I choose to spend my few minutes of oral testimony on how the Act might be revised, revised and reauthorized in a manner that benefits both wildlife and people.

How can we make the Act work? I want to outline ten points that I believe critical to the success of a new and revised Act. Number one, first we must recognize the basic truism that the development and use of private property is the basis for our nation's wealth and prosperity. That prosperity—

[Applause.]

Mr. KLUSSMANN. That prosperity is the basis for our conservation ethic and that the conservation ethic is the basis for the Endangered Species Act and other environmental legislation. We cannot separate economic health from environmental health. We must move to a win-win situation. We must have an act that's good for people and good for wildlife.

Point number two, and you've heard this before, we must scrap the penalties and we must scrap the disincentives. We must substitute a system of voluntary incentives and compensation. I think

we must create a continuum of voluntary incentives ranging from individual recognition through set-aside programs such as farm program style set-aside payments.

Once landowners have something to gain rather than something to lose from having endangered species on their property, they will be supportive of maintaining and creating habitat for endangered species, just as they are doing today with the valuable huntable wildlife species we have in this state.

Under a system of awards and incentives and landowner support, the philosophy of "shoot, shovel and shut-up" will rightfully disappear. Thus, strong property rights language must be added to the Act to protect landowners.

Point number three, there must be provisions for greater state and local input. Habitat plans should be developed before a listing and have local and state input. These habitat plans must be supported by the incentives mentioned above. Widespread public participation should be encouraged before, during and after a listing. There should be hearings locally for locally affected persons before any listing is proposed. State natural resource agencies should be given the leadership role in the development of incentive-based recovery plans.

Point number four, priorities for recovery plans must be established. The above incentives will cost money. Choices will have to be made. For example, we may not be able to save habitat for 50 subspecies of rats if the population as a whole is not threatened. Decisions on priorities should be made in concert with state natural resource agencies and focus, I believe, on habitats and ecosystems rather than on individual species protection.

Number five, this also reemphasizes something you heard this morning, listings must be based on adequate research. Peer review can be provided by the National Academy of Sciences. Persons petitioning for listings should not be eligible for research funds relative to such listing. There must be a minimum standard for the scientific information base supporting the listing. The Golden-Cheeked Warbler issue is an excellent example of a woefully inadequate research information base.

Number six, economic and social impact analyses must be conducted along with biological research during the listing process. Cost-benefit analyses and economic factors must be given high priority.

Number seven, the Act must include a strong public education program. Educational programs must begin with school children and continue through adults.

Number eight, the Act must distinguish between activities on public and private lands. Number nine, the Act must differentiate between management of threatened and endangered species. Number ten, the Act must provide qualitative and quantitative information about conditions of listed species along with expenditures directed toward the recovery of that species.

Finally, I believe it is imperative that the new Endangered Species Act include a statement that clearly spells out the intent of Congress. It must be clear that the Endangered Species Act is neither a tool for land use control nor a means to stop urban growth nor the principal tool to solve other environmental issues.

These issues must be addressed separately and stand on their own merit. We do not need any more spotted surrogates for land use control.

[Applause.]

Mr. KLUSSMANN. Texans and Americans are truly concerned about endangered and threatened species. Texans and Americans are also concerned about a wasteful and strong-handed government that has been out of touch with the people. We do need to make changes. If we do not make these changes, I believe the conservation ethic will continue to erode and all wildlife will suffer.

Thank you very much for this opportunity.

[Applause.]

[The "Problems with the Endangered Species Act" may be found at end of hearing.]

Mr. POMBO. Thank you very much. Dr. Klussman, how would you go about establishing a peer review panel, selecting people to be on a peer review panel to audit the biological data that is gathered?

Mr. KLUSSMAN. I don't think this would be very difficult. I think the National Science Foundation could help. We need to be careful that it's not peer reviewed by those people submitting the petitions for listing. We need to be careful that they are independent scientific people of the same credibility and scientific knowledge as the people developing the data.

The scientific journals that I'm familiar with go through this all the time. You have to subject your findings to a peer review system and that's really what I'm suggesting here, an independent scientific review, being careful that it is truly independent and objective.

Mr. POMBO. You also state in your testimony about preparing recovery plan, habitat map, that type of thing, at the same time that the biological data is being gathered, so that we know exactly what we're getting into when something is listed. Would you like to expand on that just a little bit?

Mr. KLUSSMAN. Yes. What I'm saying is that we need to be proactive. We need to have the research to begin with. When we have good research, we should say to the local state game and fish agency this is the situation, and we need your help in planning. Then turn to set-aside programs, or maybe even the last resort, purchase programs. We set-aside the habitat that is necessary to protect and maintain that species one way or another through incentives and so on.

When all that is to be done is known up front, with everything on top of the table, and everybody agrees, there will be no after-the-fact billing of a landowner for 5,000 dollars to pay into the kitty so he can build.

Everything ought to be known up front and we should make these decisions in advance of a listing so that there is no economic crunch coming after. We need to have research up front, we need to have information up front. With local input, we can make decisions using set-asides or other incentives to protect a species or a system or a habitat. Then, I think, there will be no hidden agenda and we can do what we need to do. We can preserve the economy and we can preserve the wildlife.

Mr. POMBO. Thank you very much. I enjoyed your testimony a great deal. Mr. Currie, I believe that there have been HCPs that have been set up by timber companies in your area. Would that be possible for a company the size of yours or how would you be affected by that?

Mr. CURRIE. Well, one HCP, Chairman Pombo, would more than wipe out all of our land. The U.S. Forest Service establishes in the area of Red-Cockaded Woodpecker about 1,110 acres as an immediate set-aside for the bird. We only have about 600,000 acres of timberland that's national forest land in Texas. Over half of that today has been dedicated to the Texas Red-Cockaded Woodpecker and it's an enormous amount of acreage that's required.

I have fewer than 300 acres of timberland. So obviously I wouldn't have enough to even make a good one-third HCP for the RCW. The big thing about it is if you want to preserve something, if you want to increase something, in our market society, we need to make it worthwhile for the person that you're trying to reach. I'd go to great lengths to avoid being offensive to this panel, but it occurs to me there's a great deal of evidence in our country that if you want to increase or expand something, you subsidize or reward it. If you want less, then you penalize it.

And the law, as it's currently applied, penalizes people who have the misfortune of owning property on which resides any kind of endangered species. I most certainly could not afford to put together an HCP. I hope I've answered your question. There are some Temple (Temple-Inland) companies over there. I brought and I will offer into the record a copy of their plans for protecting the woodpecker.

[The material may be found in committee hearing files.]

Mr. CURRIE. Champion International has made a sincere effort to dedicate a substantial amount of their acreage to the protection of the woodpecker and other species; one on the east coast, one in the Texas pine belt.

The same thing is true. Respectfully, I consider this to be legalized blackmail. We have the situation of people mitigating a portion—in their case, a small portion—of their property for the right to go ahead and manage and harvest from the rest of their property. That don't sound American to me. This is supposed to be the land of the free. This is selective enforcement of the Endangered Species Act and I hate it.

Congressman Stenholm, we have ancestors that fought and died to escape the tyranny of the whim of the king and, yet, we don't have a land of laws where endangered species is concerned. We have a situation where people apply the law selectively.

I don't approve of all the things that Maxaam Corporation has done on the west coast, but they should no more be penalized for the presence of marbled murrelet on their acreage than I should be, and, yet, other big companies are being allowed to harvest their timber because they gave HCP acreage. It's an imbalance. Like Mayor Wolff said earlier, it's not just about property rights, it's about jobs.

Congressman Cooley has thousands of people out of work. One of my best friends in this world went out of business because he had moved to Kennard, Texas to put in a sawmill at the request of National Forest managers because they had a lot of timber that

needed a local market for that timber. He came in 1967. He went out of business in 1990. They cut his mill up and sold it a piece at a time at public auction in 1991. That broke my heart and I don't think that protected the woodpecker.

Mr. POMBO. Well, sir, I think your message has come through loud and clear to this panel and to this Committee and I appreciate all of your testimony and what you've said. I would like to just, I guess, point out to you that my district in the central valley of California, there is not one square inch of it that is not habitat for something.

Mr. Stenholm.

Mr. STENHOLM. Thank you, Mr. Chairman. Just one comment. I was debating on the Private Property Rights Act when it was on the floor just a few days ago. I was called by one of the individuals who has the mistaken view of how we should, in fact, preserve our national environment, mistaken view, in my opinion.

It was basically directed to the fact that what was going to happen to the 1995 Farm Bill if some of us continued to have the attitude we do regarding private property rights. I informed him where he could conveniently hang the telephone and said that we could, in fact, clean us off the spot and get on with it.

Now, I wish that more people on the other side of the question were paying more attention to the testimony that we've heard this morning, particularly, Dr. Klussmann, yours, as it mirrors Mr. Merrill's a moment ago, and then all of the other good sound suggestions of how we can take an act and make it work better and for the purposes for which it was originally intended.

Mr. Chairman, I thank you for allowing me the courtesy of sitting in on your Task Force this morning. I look forward to working with you and your Task Force and those who have testified today to do just exactly why you're here. I appreciate very much the testimony and your indulgence.

Mr. POMBO. Thank you very much. Mr. Cooley.

Mr. COOLEY. Ms. Anderson, we spent three days last week in Louisiana and I understand your problem and frustration. And when we left that area, we understood better—being from the west, we really didn't get involved in the process of what the Endangered Species Act had actually done to fish people. Hopefully, when we rewrite it, we can take a good look at that.

Mr. Currie, I have—as you know, we are primarily in the timber industry in Oregon. We were, I should say. We also used to be in the cattle business, but we're having problems there, too. We used to be in agriculture, but we're having problems with the water. And I don't know what we used to do with the people, but we're losing them.

The Spotted Owl, as you mentioned about being a surrogate, certainly was a surrogate, that's for sure. I want to tell you that in the last four to five years, we've lost 100 mills, indirectly laid off, about 63,000 people are out of work all because of the Endangered Species Act. And, yet, when you go to the U.S. Forest Service, they'll tell you they have about 20 billion more feet of dead and dying timber that they would like to get cleaned up, but they can't do it because of the Endangered Species Act and all the legal rami-

fications that all the other environmental groups have placed upon us.

I'd like to ask you, because you're starting to be impacted by this process, what's happening to your timber labor force as they're starting to encroach upon your ability to harvest on your private land? What is going on with your mills and your employees? Is this just beginning to fall off or are you having the same problem you've had over the last five or six years?

Mr. CURRIE. Congressman Cooley, we have—and I'm ashamed of this, but we have a tremendous market surge in the Pineywoods of Texas and all up the coastal pine belt, that is in no small part because of the sacrifice that you and your people are making out there with all the environmentalism with the Spotted Owl as the God.

There is a tremendous demand. I mean, look around us today. How much do you see here that's wood products? Could we function even 24 hours, civilized, without the use of wood-based products? Absolutely not. Yet, we've done such a good job of providing this at such a reasonable price on the shelf that people take it for granted that it's going to always be there.

And so they don't say it's no big deal if a few loggers get put out of work. I think the current conventional wisdom coming out of inside the beltway is that we should teach them how to make hamburgers maybe. And I propose to you, that I don't care how tight a circle we line up in, we can't get in a circle and put our hands in each other's pockets and sell bed and breakfast and hamburgers to each other and make a living at it. There ain't no future in that.

[Applause.]

Mr. COOLEY. I think we all agree. Let me ask you something about what we witnessed in Oregon and which we are not really proud of, but we tried to keep our bills away as much as we could. We harvest many acres of timber on private property premature in order to try to keep the economy going and we're not happy about it, but we've got to do it anyway because it's continuing to happen.

Is that happening here in Texas, as well?

Mr. CURRIE. Yes, sir. And it's putting pressure not only on timberlands, it's putting pressure on county road systems. And I forgot what the man from Austin was saying this morning, something about a rat infestation or something. But it's caused a lot of problems in the State Capitol because in wet weather, as you well know, log trucks, which weigh 80,000 pounds gross, even 80,000 tears up the road if it's wet. There's a great deal of pressure being put on a lot of things other than the forest industry as a result of this imbalance that's been created as a result of what I call misguided public policy.

Mr. COOLEY. How will your people—like we in Oregon who own private property, because I happen to own a timber stand, as well as you do. We've had a cockeyed policy, we've had a state law we call the Oregon Forest Practices Act, which most of us follow anyway without the law, but we've done it for those who are maybe not as prudent as the rest of us.

Are you replenishing within a certain period of time?

Mr. CURRIE. Yes, sir. It's voluntary, but we have what may be, Chairman Pombo, the only state in the Nation that has a reforest-

ation program that's entirely funded from private sources. In the last ten years, the Texas Reforestation Foundation has had replanted almost 90,000 acres at a cost of a little over five million dollars, all private dollars, to reforest what has been harvested. But, see, 60 percent of the forest land in Texas is owned by private landowners and there's not an incentive in today's world to reforest your land. I mean, just the opposite. Let's get the trees off of it and get it turned into something that nobody wants and that way we'll have a chance maybe to do what we want to with it.

It's a perverse—it doesn't make a lot of good sense, the application of today's Endangered Species Act.

Mr. COOLEY. Dr. Klusmann, can I ask you something that the Chairman asked earlier about the committee makeup. I understand the research part of it and the science and the peer review by national boards when you make your submissions for publication, et cetera. Would you sort of address or give me some conference in your exposure to this committee? Many of the areas we've been in so far and talked to a lot of people, the local people, the people out there that really make the difference out here, feel that they're not involved in the committee process and in the final decision process because these committees are overloaded and, let's say, imbalanced of the enviros against the working people and we have not been able to change that perspective, even if it may or may not be true.

We feel, not being a scientist, that science has a certain part in it, but we need to have an equal footing in committees. So that when a decision is made, it's made for the benefit of the people on the ground.

Can you give me your view on how you feel about that?

Mr. KLUSMANN. You're referring to Congressional committees when you say—

Mr. COOLEY. No. I'm referring to the local—you talked about local input, local control as to their potential economic future and the future of the communities, both environmentally and development.

Mr. KLUSMANN. I guess, Mr. Cooley, I would reemphasize the sequence of events that I would foresee for the need for local and state input. First, it is based on good science and once we have good science and we say here is the problem, we call local hearings in advance, get local input. That local input is fed into our own state wildlife agency and, in concert with the state agency, we develop a game plan.

That game plan then begins with vegetation, what's involved, what it's going to take to save those species. I said earlier, we need to have a proactive, in-front kind of action, so that everybody knows what's going to happen, how it's going to happen, and that we're willing to pay for the habitat we're going to set aside.

It must be built from the ground up. Someone in the other panel said it's top-heavy now and that's exactly what I believe. We've got to reverse it. We've got to build a recovery plan from the bottom up.

Mr. COOLEY. So I can conclude from your statement that whenever we finish the science and we decide that the species needs to be protected, that those people out there that pay the bill are going to have equal right in decision and we're not going to turn it over—

when we rewrite this law, I would like to see part of the turnover is that we don't turn it over completely to the parks and recreation to make the decision. We let the community participate on an equal footing basis.

Mr. KLUSMANN. That's right. That should be, I think, in the procedure of the Act. And I'd like to emphasize the fact, too, that the present Act does not have an educational component. We had a study recently, I think it was fourth or fifth grade, I'm not sure of the grade, but 60 percent of the children thought the white-tailed deer was endangered in Texas and we have four million, I believe, in Texas.

So we've got to start with school children and we've got to go through adults. We must have education and we must get involvement, then I think the long-term solution to the Endangered Species Act problems might be foreseeable.

Mr. COOLEY. Thank you very much. I have no further questions.

Mr. POMBO. Congressman Chenoweth.

Ms. CHENOWETH. Thank you, Mr. Chairman. Ms. Anderson, you mentioned that your catches were seized. Was that by the National Marine Fisheries Service?

Ms. ANDERSON. National Marine Fisheries Service has the U.S. Coast Guard as the enforcement agent and, yes, we had a million dollars worth of shrimp taken from the boats last year.

Ms. CHENOWETH. How many incidents?

Ms. ANDERSON. In Texas alone, I would say right at the beginning of the season we had about 30 incidents just over simple technicalities, maybe a piece of webbing was torn through normal operation or the angle may have been off and the shrimp was taken from the vessel.

Ms. CHENOWETH. Do your vessels have TED devices in them?

Ms. ANDERSON. Every boat in the Gulf of Mexico has a TED who has been there since 1990.

Ms. CHENOWETH. That's commendable. I'm not sure how well they're working. But your cooperation is commendable and your effort in trying to make it work under onerous circumstances is commendable.

Let me ask you a question. You mentioned that the Texas Shrimp Association is trying to prepare a workable plan. Do you have any assurance that the plan will be considered by National Marine Fisheries Service or the Coast Guard?

Ms. ANDERSON. I feel sure that NMFS is going to have to address it because it is professional. Industry is paying for it very dearly.

Ms. CHENOWETH. Ms. Anderson, I would be personally interested in knowing how that works. Could you please keep me personally informed?

Ms. ANDERSON. We'll be filing a report with the biological opinion. I will submit it to go along with my original statement, because it does coincide. We are coming with that draft plan in about a week or two, because the emergency response plan says NMFS will implement those regulations on April 1, '95. We've only had two weeks to prepare.

Ms. CHENOWETH. Thank you. Mr. Currie, I think your testimony was exceedingly good. With regards to the pressure that the shut-down of our forests and, in fact, our private sector is putting on

local units of government because of the lack of in lieu taxes, or PILT, that the Forest Service is able to reimburse the counties with, that really does impact schools. That really does impact school lunches. It impacts a lot of things, and I thank you for bringing that out.

I do want to ask what is your feeling with regard to overall forest health since the Red-Cockaded Woodpecker has been listed? Are we in a state of better forest health now or—what is your opinion with regard to forest health?

Mr. CURRIE. Ms. Chenoweth, we have a total, over in deep east Texas, of five separate wilderness areas that were designated robust, and the way we made them robust was taking bulldozers and putting piles of dirt across the roads and closed the roads and then we call them robust. We have 35 to 37,000 acres total of wilderness that was designated—in our case and I guess in all cases—Mr. Chairman, the U.S. Forest Service in wilderness areas takes a hands-off approach, I believe in your state, too, Ms. Chenoweth. It doesn't work.

If you're worried about forest health, man has to be involved. There has been some kind of a misguided perception created in our country that if it's natural, it's good. If it's not natural, it's not good. And God help a man who is not in nature. In those cases in east Texas where we have wilderness areas, over half of those acres now in less than ten years have been desimated by the Southern Pine Beetle. The Indian Mouth Run, total of 12,600 acres, today almost 10,000 of those acres—it's not a matter of most of it being dead. It is all dead. It's like the Blue Mountains on the east side of the Sierra that Mr. Cooley referred to. It's all dead. There's nothing there, as a result of mismanagement, misguided public policy. I call it M&M management, manipulation and misinformation.

Ms. CHENOWETH. That's very interesting, Mr. Currie. You also testified to the fact that 1,100 acres had to be set aside for each Red-Cockaded Woodpecker. Is that per breeding pair or per woodpecker?

Mr. CURRIE. No, ma'am. The judge said active or inactive, if there's been a woodpecker there in recent history and left a hole in a tree, we cannot cut it. It's woodpecker colony.

Ms. CHENOWETH. So at the very least, then, it would take 2,200 acres per breeding pair of Red-Cockaded Woodpeckers.

Mr. CURRIE. Well, unless they were friendly enough to live together.

[Applause.]

Ms. CHENOWETH. Mr. Currie, I don't understand how they could even find each other in 2,200 acres.

[Laughter.]

Mr. CURRIE. We even have instances where—first, they tried to tell the mama bird and put a string on her leg and put her to the tree. They climbed the tree, a perfectly good healthy tree, with a power saw and put a hole in it, tended this mama bird and let it work until some daddy bird came along. Now they don't do it that way. They put a string over the hole and put a long string on the screen, so that when the daddy bird gets there, they're pretty sure they're going to make friends, they pull the string so the mama bird can get out. It's called Federal housing for the birds.

[Applause.]

Ms. CHENOWETH. Mr. Chairman, thank you.

Mr. POMBO. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman. There's two things that hit me right between the eyes. Number one, there is a noticeable lack of common sense going with any of these things that we're talking about.

[Applause.]

Mr. THORNBERRY. The second thing, as Mayor Wolff said earlier, what we're talking about is jobs and people's ability to earn a living and it doesn't really matter whether you're in the shrimp business, the logging business, farming and ranching business, or you work on a military base in San Antonio. Your ability to earn a living for your family is threatened by these silly regulations and this law that has caused us so much trouble.

[Applause.]

Mr. THORNBERRY. And it's one thing if you have the financial resources, like Mr. Bamberger had, to funnel all this money in and make a wildlife refuge out of your ranch. But if you're trying to earn a living off the place at the same time, then you're in a completely different situation and I think that's what we're dealing with.

[Applause.]

Mr. THORNBERRY. Mr. Wyatt, I want to focus for a second on the particular problems that we've had up in the panhandle area with this little minnow that seems to be everywhere. Can you tell us briefly something about what's at stake? And I'm talking about people's ability to earn a living and how could this designation affect folks in our neck of the woods?

Mr. WYATT. Perhaps it already has affected the Air Force Base. It's put on the list. It's up near the top and, in all probability, it will be closed and we share the same problem that Mayor Wolff does in San Antonio.

It has, we've seen, a much higher rating in past reviews. So we don't know for sure that this has affected it, but it very well could. That's one of the main things. The second thing is we get most of our water for 11 cities from Lake Meredith, which is on the Canadian River, and all of the information in the proposed rule indicated we were going to have to manage the reservoirs differently and the stream flow in the river. We don't have enough to go around anyway and releases below Lake Meredith to the lake. We're also trying to clean up some small springs to improve the quality of water. So that may affect us.

But the biggest threat, I think, is to groundwater pumpage in here. The rule, as proposed and written, it could extend as much as 200 miles back in any direction or north and south and it may cover our cost reduction as much as a half if they regulate us down in the Edwards Aquifer, which will, in essence, devastate the entire economy of the area because we're an agricultural-based economy.

And I'd like to go on and say that in the range of the Arkansas River Shiner, we grow a lot of wheat and, of course, in Oklahoma and Texas and this wheat is exported to 90 nations of the world and, of course, used throughout the United States to make bread, rolls and whatever.

That's very important. We've got the largest feed lot operation in the world right in the High Plains of Texas and we certainly ship meats to other nations, as well as other states, and I hope you enjoy some of it while you're here. We also grow about a fifth of the nation's cotton and if you cut that supply down—well, everybody's got cotton in their underwear.

[Laughter.]

Mr. WYATT. But, nevertheless, it could be extremely devastating. And you asked me to be brief and I wasn't and I apologize. Thank you.

Mr. THORNBERRY. But I think that's a good point. It gives a range of the kinds of people whose jobs and ability to make a living is threatened. It's everything from cotton farmers to people who work in feed lots and the industries that go from there.

As I understood your testimony, after this minnow was put on the proposed list, an actual survey found that it was thriving everywhere and in the Canadian River and, yet, the Fish and Wildlife Service said, yeah, but we might have something come by and wipe them all out all at once. Is that a fair assessment of what's happening?

Mr. WYATT. Yes.

Mr. THORNBERRY. And so it doesn't really matter whether you've got a whole bunch of them now or not. You might not have a whole bunch sometime in the future and they need to be protected anyway.

Mr. WYATT. That's right. That's their opinion.

Mr. THORNBERRY. So if that's the philosophy that they operate under, there is no species which is beyond the reach of these folks if that sort of approach is allowed to stay in.

[Applause.]

Mr. THORNBERRY. Mr. Chairman, I appreciate your willingness to have the hearing and hear about some of the particular problems in Texas. We've had a number of meetings and hearings in our area about this particular species and I'll have a number of resolutions and other bits of information that I'll be submitting for the record. Thank you.

Mr. POMBO. Thank you very much. Mr. Smith.

Mr. SMITH. Mr. Chairman, thank you. I just want to point out to you that I believe that we have set a record for all your hearings that you've had around the country today. As I understand, we had 750 people show up early this morning, most of whom stayed late, and we appreciate your interest. We appreciate your concern. You're here because of your vital, vital interest in protecting your constitutional right to private property rights.

I just want to thank the people who are here and thank you, Mr. Chairman, for choosing this location and for choosing this subject, as well, for a hearing.

Mr. Wyatt, I'd like to ask a couple of questions to you. You mentioned several ways that we might change the process by which we designate critical habitat or list an endangered species. What would you recommend to Members of Congress who are here today as far as specific ways we might amend the Endangered Species Act and what criteria specifically would you add that are not now incorporated in the Endangered Species Act?

Mr. WYATT. Number one is not to only list it, but make sure it is, in fact, an endangered species by proper study, scientific data. Number two is that in the process, combine the habitat and the listing as far as where the species—combine habitat in that. But as much as possible confining only to the geographic area where the little critter lives. Again, in our area, it could be 200 miles on either side of the river and they're all in the river.

So that needs to be done and then as we go through the process, then we certainly need peer review by, let's say, National Academy of Sciences to say that they are, in fact, threatened and endangered.

But I've heard a lot of testimony on this and the Golden-Cheeked Warbler and they don't have any data. They don't have any historical data as to how many Golden-Cheeked Warblers were ever here at any one time or how many are here right now. And this is the same way they are on virtually all of it. So I think a lot of it's just a put-up job to control and manage the land.

[Applause.]

Mr. SMITH. I agree with you. They know what they're trying to achieve and they're just using the Endangered Species Act as an excuse to try to achieve their goals, whether it be national zoning or land planning or whatever it might be.

[Applause.]

Mr. SMITH. Let me address a question to both Dr. Klussmann and you, Mr. Wyatt. I, as you know, have a special interest in the Golden-Cheeked Warbler because 19 of my 21 counties may yet be designated all or in part as critical habitat for that particular bird. What additional research could we do in regard to the Golden-Cheeked Warbler?

Mr. KLUSSMANN. Some of it is being done now, but basically I think, as has been mentioned here several times, we do not know exactly how many birds we have. We do not know how many acres are really needed for a breeding pair. We've had estimates from 4,000 to 16,000 breeding pairs in Texas. We do not have good research as to what's happening to the populations in Mexico and along the way to their wintering grounds.

So I guess it gets back to the bottom line, what we've said, the Warbler issue is a perfect example of not knowing what we're about when we listed the species as far as the research base is concerned. Just about any ecologist will affirm that we are just beginning to get the information we should have had before the bird was listed.

And, of course, some of that information is going to be—has to be directed to what difference are we going to make in the United States and in Texas relative to this bird in the face of what will be done in countries that we do not control.

Mr. SMITH. Dr. Klussmann, as you know, we in the House have passed a bill that will compensate private property owners for the lost value of their property and Senator Phil Graham is getting ready to introduce a like bill over on the Senate side next week. My question for you is are you concerned about the cost of reimbursing landowners for the lost value of their property and, if not, why not?

Mr. KLUSSMAN. Well, it may cost money. It may—or it will cost money, but it may not cost more than we're already spending on endangered species. It's important to set some priorities, as Mr. Wyatt said, we're going to have to figure out the keystone species, know what we're spending, know what we're doing in a recovery plan, and then move in that direction.

Mr. SMITH. And the point of the bill that we've all supported who are up here on the panel is to make the government agency who has promulgated that regulation pay and once we do that, they're going to have a lot less reason to pass or enforce and try to regulate the way they are right now. So I don't think there's going to be a cost to the American people. What I think we're going to do is to bring some common sense and some balance back into the Endangered Species Act and other regulations.

Mr. KLUSSMAN. It may be just redirecting dollars to the right place at the right time.

Mr. SMITH. And, lastly, you talked about the need for good science a while ago. Under the current way that the Endangered Species Act is interpreted and enforced, aren't we putting cockroaches on the same level as Whooping Cranes and Bald Eagles and isn't that part of the problem? We're not setting priorities, we're not saying what's really important to protect and what's not.

Mr. KLUSSMAN. Yes. I think priorities are going to be absolutely imperative and we're going to have to say that human values and human needs make a difference. We have the same problem with our wildlife refuges. There are many in this country who say put up four walls and don't even walk on the inside. Well, I don't support that philosophy. I think all we have in this nation and the world are human values. We make the values and we're going to have to value our wildlife appropriately—

[Applause.]

Mr. SMITH. Mr. Chairman, I thank you for holding this hearing today. I think it's going to be beneficial to us and it will, I hope, help us produce good legislation in Washington.

Mr. POMBO. Thank you. Mr. Bonilla.

Mr. BONILLA. Thank you, Mr. Chairman. I'd like to direct my questions, if I could, to David K. Langford, if you'd be so kind, Dr. Klussmann, to hand the microphone over to him. Mr. Langford, you're Executive Director of the Texas Wildlife Association. Can you tell us—you are a property owner, as well, are you not?

Mr. LANGFORD. That's correct.

Mr. BONILLA. Can you tell us, just for the record, where your property is located?

Mr. LANGFORD. My family's property—we've been in this county since about 1851. It's about 15 miles slightly northeast of here.

Mr. BONILLA. So how many generations does that go back? My math isn't working for me real well.

Mr. LANGFORD. I'm fifth generation. My children are 25 and 23. They don't have any kids, but some of their cousins have kids. So we'd be seven generations basically on the same land.

Mr. BONILLA. I understand, from having seen you work and seeing you appear at property rights meetings around the state, that you have done a lot to preserve the land that has been passed on

from generation to generation. Could you tell us about that, Mr. Langford?

Mr. LANGFORD. I'd be happy to. We were all raised—some of my cousins and aunts are in the crowd. We were all raised to be the best stewards that you could be. If you were placed by fate or fortune in a stewardship position, it was your duty to mankind to do the very best job you could do, whether it was endangered species or game animals or livestock or plants or pets or people.

That's the way we were raised and I think that's probably the way most of the people in the room and most of the landowners in the Texas Hill Country and, for that matter, elsewhere were raised.

[Applause.]

Mr. LANGFORD. What's been done has been to take many generations who have been taking care of the resources, taking them and making us into the bad guys. We don't think that's right.

Mr. BONILLA. Could you elaborate, Mr. Langford? In the last generation, we have, of course, seen the Endangered Species Act. What has that done to your property?

Mr. LANGFORD. It's hard to say because it's kind of like everybody has, I guess, their favorite "Royalism."

Mr. BONILLA. I saw your boots as you walked in today. I know where you're coming from.

Mr. LANGFORD. One of the reporters asked him a question after Peschel ran under that pass, back there the last time for the national championship, and didn't he realize that on fourth down, calling a pass, especially a bomb, that only bad things could happen. Daryl said, "Listen, what could happen did." And the problem we're facing in the Hill Country is not a question of what are we limited to right now, especially those of us who don't want to sell—but what could happen to the future.

Mr. BONILLA. Let me ask you about the administration and enforcement of the Endangered Species Act. There are complaints that the Fish and Wildlife uses the judiciary system as a means to enlarge the agency's authority. Are you aware of any occurrences in Texas that have led to this conclusion?

Mr. LANGFORD. Yes, sir. I'm glad you bring that up because in all of the years we've been involved in this, we don't hear much about the supervision and about how the bureaucracy uses the legal system to expand their authority. Two things you can count on from the bureaucracy that I'm sure you all know is, number one, they're attempting to protect their jobs; number two, they will attempt to expand their empire.

What happens is the Fish and Wildlife Service uses an environmental organization and says, look, why don't you sue us, we'll give up and lose and cut a deal with you. Therefore, we're going to have to expand our empire because you sued us to list something, we're going to back out of the picture and we'll go ahead and lose the decision. Therefore, we're going to need more pickup trucks, more employees, more studies, more facilities, more et cetera.

So the citizen suit provision has been used by the Federal bureaucracy to expand their influence.

Mr. BONILLA. I'd like to move now, Mr. Langford, to scientific peer review. There has been considerable inference to this concept as a means of assuring sound scientific input in connection with

listings, recovery plans and the like. Is it your belief that peer review would force the agencies to be more objective?

Mr. LANGFORD. Absolutely. I'd like to address one portion of that peer review. Everybody just says peer review, but we've got to be careful against this bureaucracy that will lay down in front of a lawsuit. You've got to be careful to keep them from over-using the peer review with the peers that are their favorites.

I'll give you one example. The head of a Biology Department at a Southwest Conference University totally underwrites his department with the Endangered Species Act; and, the Fish and Wildlife Service, through Section 6 of the Act, funds most of his department's activities. Now, how objective is peer review going to be from that man?

Mr. BONILLA. I appreciate your answer. I think it's a very, very good point that this Committee will take to heart as we look at reforming this legislation.

Mr. Langford, members of the panel, thank you for being here today. I know this is the final round of questioning and my time is up, but in closing I would also like to thank Chairman Pombo for bringing this historic hearing to Texas. I first met Richard, we both began our terms two years ago, last term, and quickly found that we have a common cause that we're going to fight for every day in Washington and that is to preserve property rights and to preserve the values that our great Constitution has set up for this country.

The radical left wing element in this country has declared war on the west. With everybody in this room, with all your help and with the help of the other Members of Congress around the country that are concerned about this, as well, I am confident that we're going to win this war if only you will stick with us. Thank you.

[Applause.]

Mr. POMBO. Thank you. I would like to thank this panel for their testimony, their answers to the questions, as well as the previous panels. When we started this process, our goal was to go across the country and listen to the people who have had to live under this Act and to try to gain from that the knowledge and the understanding of what changes needed to be made.

I think that this hearing has taken us a step further toward our goal of understanding what changes need to be made in the Act so that we can adopt what is truly an Endangered Species Act, not a land use planning act or not a way of controlling old growth forests or whatever else somebody gets a crazy idea they want to protect.

I think that the idea behind the Act when it was originally brought up in the early 1970's was to protect endangered species and to truly protect them. That was the goal of the Act at that time and I think that should be the goal of the Act that we will adopt.

I would like to also thank my colleagues for taking time away from their districts and their families to come down here and enjoy the hospitality of Texas, enjoy the hospitality of Lamar Smith and Henry Bonilla, both of which have been true fighters in a number of instances for private property rights and for common sense in government. I thank them for extending their hospitality and to the people from Texas for their hospitality.

I would also like to thank Mr. Stenholm for taking time away from his district to come down and join us on this panel and for his valued input into this issue not only at this time, but in the past. Thank you once again for your hospitality in hosting us down here. I will make you one promise as the Chairman of this Task Force, that I will do everything in my power to put some common sense back into the way this Act is being implemented and I know my colleagues join me in that.

[Applause.]

Mr. POMBO. Thank you.

[Whereupon, at 1:30 p.m., the hearing was concluded; and the following was submitted for the record:]

LAMAR SMITH
21ST DISTRICT, TEXAS
JOHN W. LAMPMANN
CHIEF OF STAFF



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COMMITTEE ON THE JUDICIARY

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House of Representatives

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**Congressman Lamar Smith:
Fighting to Protect Private Property Rights**

"I believe that the fight to protect private property rights is the civil rights issue of the 90s. I intend to make this Congress the private property rights Congress."

-- Cong. Lamar Smith (Republican, 21st District of Texas)

- **Enact legislation that protects private property:**

Congressman Smith has introduced two private property rights bills:

1. The Private Property Rights Litigation Relief Act of 1995 (H.R. 489)--Requires the government to compensate private property owners for regulations which diminish the value of an "affected portion" of their property by 10% or more; Codifies three recent Supreme Court decisions protective of private property rights; Allows property owners to obtain payment and protect their rights quickly, easily, and inexpensively

2. The Farm, Ranch, Homestead Protection Act of 1995 (H.R. 490)-- Imposes a moratorium on new Endangered Species Act (ESA) listings and designations until Congress amends the law; Require the government to compensate property owners harmed by governmental restrictions under the ESA.

Congressman Smith led a successful bipartisan effort to include this moratorium in the Regulatory Transition Act of 1995 which passed by the House and now before the Senate.

3. In addition, Congressman Smith worked with the Congressional leadership to develop and pass the private property rights provisions in the Contract With America. He sits on the Judiciary Committee's Subcommittee which passed the Private Property Protection Act contained in the Contract. Congressman Smith was appointed to Speaker Newt Gingrich and Majority Leader Dick Armey's Regulatory Reform Task Force where he successfully worked to pass the property rights provisions in the Contract by a margin of 277-142.

- **Use the budget process to protect private property rights:**

Congressman Smith is a member of the House Budget Committee, a position which he is using to protect private property rights. In considering funding for everything the government does in light of the need to balance the budget by 2002, Congressman Smith will seek to ensure that any agencies and functions which receive funding also respect the private property rights of the American people.

- **Organize the bicameral, bipartisan Congressional private property rights (CPR) coalition:**

Congressman Smith organized this new coalition, which has more than 70 members of the House and the Senate to co-ordinate supporters of private property rights in both parties in the House and the Senate.

Congress Acts To Protect Private Property

I've used this column to talk a lot about the need to protect private property from burdensome government regulation. It's a civil rights cause that we've together supported for some time. Last week, our hard work paid off. The House of Representatives passed the Private Property Rights Protection Act of 1995.

This monumental legislation will require the federal government to compensate you if it wants to use a portion of your private property to preserve an endangered species or conserve wetlands. If government regulations diminish the value of that portion of your property by 20%, you can demand compensation. If the government takes 30% or more of the value, so that they own more of the land than you, they'll have to file in court the intent to buy the land. The Private Property Protection Act makes all government agencies minimize the impact of rules and regulations on all kinds of private property.

I'd like to see Congress act to protect all private property from every governmental regulation.

Your Voice In Washington

Congressman

Lamar Smith



To that end, I have introduced legislation that goes beyond the Private Property Protection Act. But the bill we passed last week, after much hard work, is a good first step.

As you know, I have worked to protect private property rights since I was elected to Congress. At the beginning of this Congress, I joined the Constitutional Subcommittee of Judiciary Committee to help the House and Senate consider the Private Property Protection Act. I was pleased to successfully offer an amendment to strengthen the bill after several other Members sought to limit compensation to 33-1/3% of

a reduction in property value. In addition, I worked to pass this historic bill as the leader on private property rights within the Regulatory Reform Task Force set up by Speaker Gingrich and Majority Leader Dick Armey.

The importance of protecting private property rights also encouraged me to found and set up the Congressional Property Rights or "CPR" coalition. This coalition brought together over 60 Democrats and Republicans from both the House and Senate who share our commitment to the Fifth Amendment.

My participation on the Constitution Subcommittee, the Regulatory Task Force, and the Congressional Property Rights

coalition allowed me to help lead the effort to pass the Private Property Protection Act. But our long meetings, difficult debates, and careful drafting would have been for nothing without the grassroots support of the millions of Americans who contacted me.

The strong support of the Americans from across the U.S. can people in letters, telephone calls, and telegrams was truly amazing. The phones on Capitol Hill lit up.

Last week, we in the House made a difference. The Private Property Protection Act will allow for more protection of owners, ranchers, families, and business owners suffering under the yoke of heavy government regulation. Our success was only possible because of the thousands of telephone calls, telegrams, and letters from Americans who demanded meaningful change. The Private Property Protection Act bridges the gap between the Republican and the American people, we are making a difference every day of the 104th Congress.

My office in Washington is here to serve the needs of the District. Please don't hesitate to call at 202-225-4736.

For Publication: Week ending March 13, 1995.

Contact: John Lampmann, Office of Congressman Lamar Smith, Office 202-225-4736

Most Endangered Species: The Landowner

If the government really wants to protect what's endangered, it should add the Texas landowner to its list of threatened species.

Regulations imposed under the Endangered Species Act and other federal laws threaten to reduce our farmers, ranchers, and other landowners to a rare breed. It's time for Congress to act to protect the Constitutional rights of private property owners and to put common sense back into our laws.

The dilemma which faces private property owners is simple: When the government wants to put a highway in your backyard, the Fifth Amendment to the Constitution requires the government to provide fair compensation. But if a government agent decides to use your property to preserve an endangered species, the agent is not forced to pay. Across our nation, private property owners are denied their Constitutionally guaranteed private property rights by absurd, cumbersome regulations.

Landowners in 33 Texas counties are endangered because their land may be designated as "critical habitat" for the golden-cheeked warbler. This designation could render the owner of property in the state of Texas a private property violator. In Montana, a rancher was fined \$3,000 for violating the Endangered Species Act. His crime? He shot and killed a griz-



Your Voice

In Washington

Congressman
Lamar Smith

ly bear that charged him on his own property.

In Round Rock, a school could not be expanded because federal agents discovered a blind cave spider nearby. Government officials delayed after the school district had spent almost

"Congress must stop the silent encroachment of overzealous regulators and end the erosion of private property rights in America."

\$100,000 of taxpayer money. We don't have a dollar to waste on a creature that alone for a blind cave spider.

Just imagine if the Endangered Species Act had been around throughout our history. George

puts a mention on new regulations under the Endangered Species Act until Congress has the opportunity to change the law to include the rights of landowners.

Congress' efforts to protect private property and to reform laws such as the Endangered Species Act will help to protect the environment. Where possible, we need to replace the environmental laws that use heavy regulation and big government with market oriented approaches that provide incentives for private landowners to conserve natural resources.

More than 200 years ago, James Madison warned our forefathers that there are more reasons for the abolition of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations. "Today's absurd regulations erode private property rights until that this warning is as valid today as it was in Madison's time."

Congress must stop the silent encroachment of overzealous regulators and end the erosion of private property rights in America. Until we act, the basic freedoms and liberties of our citizens will remain endangered by overzealous regulators.

My office in Washington, D.C. is at 202-225-4236. Please don't hesitate to call at 202-225-4236.

Reclaiming the Right to Private Property

Two hundred years ago the Founders of our country went out of their way to write into the Bill of Rights a guarantee of the right to private property.

Having fought a revolution to free themselves from the tyranny of British rule, the Founders knew that private property is the most solid bulwark against intrusive government. Indeed, the right to private property is an integral part of the very foundation of freedom itself.

Somewhere during the following two centuries, Congress has managed to lose sight of the Founders' wisdom.

As just about any Texas landowner can tell you, at some point issues involving cave spiders and golden-cheeked warblers began to concern the federal government more than the rights of taxpayer citizens.

Despite the Constitution's requirement that the federal government not deprive anyone of their property "without just compensation," overzealous federal regulators have issued countless environmental rules that render valuable property nearly worthless. Realists have lost their way.

Your Voice In Washington

Congressman
Lamar Smith



Legislators have actually put more than 100 bills in front of Congress that would strip away the right to private property. In most cases, the bills were "vetoed."

House Republicans have a historic opportunity to return to the

on. Its provisions include the following:

- Compensation to any property owner whose holdings are devolved by 10 percent or more as a direct result of government regulation.
- Owners must be reimbursed by the regulating agency.
- Arbitration is available for owners who feel they've been offered less than they deserve.

We also plan on introducing a comprehensive "Property Owners' Bill of Rights" that ties together compensation, litigation relief, and bureaucratic restraint.

President Ronald Reagan signed an executive order requiring that Federal agencies determine the burden of their actions on the private sector in advance.

Known as the "Look before you leap" rule, it has been allowed to languish unenforced by the Clinton administration, which spouts new regulations without concern for what happens when they hit innocent taxpayers.

We intend to put some teeth back into the rule.

What we don't want to do is prevent responsible management of the environment, which everyone agrees is of real concern.

We simply want to make sure that the environmental man brings part of the equation again. We want environmental regulators to *prioritize* their concerns, just like every American family and business, instead of trying to enforce their every whim.

What's the environmental actually cost? And we want to make sure that the cost of protecting the environment is spread evenly, instead of being dumped unfairly on a handful of those who happened to own the wrong lot at the wrong time.

Sound revolutionaries? It did to the Founders, too.

My office in Washington is here to serve the needs of the 21st District. Please don't hesitate to call at 202-225-4236.

For Publication Week Beginning December 19, 1994.
Contact: Scott Monney, Press Secretary, Office of Congress
"Lamar Smith, Office 202-225-4236, Home 202-547-9041

COMMENTARY

The federal government in your backyard

By Lamar Smith

If the government puts a freeway in your backyard, it has to pay you fair compensation. If a government agent decides you can't do what you want with your own land because an endangered insect lives there, then you should be entitled to compensation as well.

That's only fair. Actually, it seems like simple common sense. But like so much in politics and Washington, fairness and common sense do not always prevail.

The Supreme Court has ruled, in *Lucas vs. South Carolina Coastal Commission*, that property owners whose assets are rendered worthless by government regulation are entitled to compensation for their loss.

Mr. Lucas had purchased two seaside lots for almost \$1 million, planning to build homes on them. But before he began the state abruptly and arbitrarily declared his land off-limits for development. His \$1 million investment would have been worthless, had the Supreme Court not intervened.

Unfortunately, most private property rights cases are not as simple or as cut-and-dried as Mr. Lucas'.

More often environmental and other regulations only reduce — not completely eliminate — the value of privately-held land.

In these cases of partial diminishment of value, even when the losses amount to enormous sums of money, property owners historically have had very little right to compensation from the government. That can put them at the mercy of overzealous environmental regulators and other federal employees who have lost sight of the Constitution in their effort to impose on the rest of the population their extreme views on resource use and development.

That's just plain wrong. Taking away the right to do as you please with your land, as long as you don't directly and concretely harm anyone else, amounts to stealing by

government regulators who don't want to purchase the land but do want to control it. It's the kind of abuse of power that our nation's founders rebelled against in the Revolutionary War.

That's why I have introduced a bill requiring government agencies that significantly restrict property use for any regulatory reason to make two fair market offers to protesting owners.

One would be an outright purchase of the land. The other would be a reimbursement for the decrease in its value.

Owners not satisfied with either of the offers could appeal to binding administrative arbitration, which would achieve a quicker result at far less cost than a lawsuit.

Of course, the right to remedy from the courts would also be maintained. But a great many of the kind of cases that are now clogging up court dockets could be dealt with administratively, freeing up our overburdened judicial system to focus more on criminals and less on protesting owners.

Certainly we all want to preserve the environment for ourselves and future generations. And we're ready to make sacrifices as a society to achieve that goal.

But we have to do it together. Individual property owners should not be forced to bear a disproportionate share of the burden just because they happen to own the wrong lot at the wrong time.

Environmental extremism cannot be allowed to overrule the constitutional rights of American citizens. The Fifth Amendment unequivocally guarantees that private property shall not "be taken for public use without just compensation."

Ultimately, there's very little difference between the government taking someone's land to build a freeway and restricting its use because of an endangered species. The Constitution was written to protect the rights of the individual, not the government, and the individual property owner really ends up in the same situation either way. The state has taken away the right to use their land as they see fit.

More than 200 years ago, James Madison observed that "there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." The Lucas case reminds us that this warning is as valid today as it was two centuries ago.

It's time to stop the silent encroachment of overzealous regulators and end the erosion of private property rights in America.

Lamar Smith is a Republican member of the House from Texas.

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Congress of the United States
House of Representatives

COMMITTEE ON THE BUDGET
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON CRIME
AND CRIMINAL JUSTICE

SUBCOMMITTEE ON INTERNATIONAL LAW,
INVESTIGATION, AND REFORMS

HOUSE REPUBLICAN
POLICY COMMITTEE

January 10, 1995

**CO-SPONSOR THE PRIVATE PROPERTY RIGHTS
LITIGATION RELIEF ACT OF 1995**

Finally, the Private Property Rights bill that does it all:

- 10% diminution in value constitutes taking (same requirement as Contract With America language)
- Litigation relief to allow Americans to vindicate their Constitutional rights in court

Dear Colleague:

Tomorrow I will introduce the Private Property Litigation Relief Act of 1995, legislation which is essential to permit Americans to secure their Constitutionally-guaranteed Fifth Amendment rights in the courts. This bill is similar to legislation that Senator Orrin Hatch of Utah offered in the U.S. Senate last week. I welcome all Members who are committed to the Constitution's guarantee against uncompensated takings to co-sponsor this legislation.

The Fifth Amendment to the U.S. Constitution provides that: "Private property shall [not] be taken for public use without just compensation." The authors of the Constitution included specific protection for private property within the Constitution because they understood the importance of private property to a nation governed under the rule of law which protects the liberties of its citizens.

Our nation's proud heritage of freedom and opportunity is rooted in the Fifth Amendment. Too often, however, our Founding Father's wisdom is ignored in Washington. Families, farmers, and business persons across the United States are oppressed by an encroaching, overreaching federal government, whose regulators and officials violate their liberties. Economists have estimated the cost of regulation may approach \$7,000 per household, by the year 2000. Economist Paul Craig Roberts estimates that the number of laws which Americans are forced to endure has risen a staggering 3000 percent since the turn of the century.

PLANS 7-76

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Talking Points
Private Property Rights Litigation Relief Act of 1995

1. Provides a clear definition of a "regulatory taking" at 10%— Regulations which diminish the value of private property by more than 10% requires compensation to be paid to the property owner.

Existing precedent fails to provide a uniform definition of a regulatory taking.

2. Provides litigation relief by permitting property owners to sue for either monetary relief or injunctive relief in both the U.S. Court of Federal Claims and the federal district courts

Under existing law, property owners must elect between suing for monetary relief in the U.S. Court of Federal Claims or injunctive relief in the federal district courts. The government often claims that property owners have sued in the wrong court, bouncing private property owners back and forth in a "Tucker Act Shuffle."

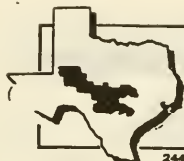
3. Codifies recent Supreme Court decisions defining "takings" of private property that require compensation to the private property owner:

- a. Requires compensation for regulations which eliminate the value of private property— Codifies the Supreme Court's 1992 decision, Lucas v. Carolina Coastal Council
- b. Requires compensation for regulations which impact private property but fail to "substantially advance" their purported purposes— Codifies the 1987 Supreme Court's decision, Nollan v. California Commission
- c. Requires compensation for government regulations which condition the granting of a license, permit, or right to use the property unless the condition imposed on the landowner is "roughly proportional" to the government's need for the regulation— Codifies the 1994 Supreme Court decision, Dolan v. City of Tigard

Federal courts often find takings cases difficult to decide. By codifying the three most recent Supreme Court cases, this bill will clarify the often muddy takings jurisprudence.

4. This bill protects states. Like the unfunded mandates bill, this legislation makes the federal government responsible for the impact of burdens it imposes on states which take private property rights.

(over)



NEWS from

21st District Texas

Congressman

Lamar Smith

2443 Rayburn House Office Building • Washington, D.C. • 202-225-4236

**SMITH AND HUTCHISON
INTRODUCE BILL TO PLACE MORATORIUM
ON ENDANGERED SPECIES ACT**

FOR IMMEDIATE RELEASE

January 11, 1995

WASHINGTON, D.C. -- Congressman Lamar Smith today introduced a bill to put an immediate moratorium on all new listings of endangered or threatened species under the Endangered Species Act until the act comes up for reauthorization. Texas Senator Kay Bailey Hutchison introduced a companion bill in the Senate.

This legislation will also impose a moratorium on the designation of critical habitats and on the current requirement that all federal agencies consult with the U.S. Fish and Wildlife Service when issuing permits or providing funding that may affect endangered species. In addition, the bill will grant private property owners eligibility for "just compensation" for loss of value to their holdings due to Interior Department actions involving "critical habitat" after the moratorium expires.

"This bill is designed to protect the most endangered species of all-- the Texas landowner," Smith said Wednesday. "It will force the bounty hunters at the Department of Interior to suspend their chase until Congress has the opportunity to amend the Endangered Species Law to protect both the Constitutionally guaranteed rights of landowners and the environment."

Smith also expressed "cautious skepticism" about yesterday's announcement by Interior Secretary Bruce Babbitt of his latest proposal for the Balcones Canyonlands habitat conservation plan. "As currently written, both the Endangered Species Act and the new Balcones Plan permit government officials to infringe on Texans' Fifth Amendment rights without providing just compensation," he said.

"There are a lot of details left to be determined in Travis County and our legislation is designed to make sure those details include the concerns of landowners and common sense," Smith said.

CONTACT: Scot Montrey
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Committee on the Budget • Committee on the Judiciary
Chair, Subcommittee on Immigration and Claims • Subcommittee on the Constitution



NEWS from

21st District Texas

Congressman

Lamar Smith

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SMITH NAMED TO LEADER'S TASK FORCE ON REGULATORY REFORM IN CONTRACT WITH AMERICA

Intends to Focus on Private Property Rights

FOR IMMEDIATE RELEASE

January 27, 1995

WASHINGTON, D.C. -- Majority Leader Dick Armey today named Congressman Lamar Smith to the Leader's Task Force on Regulatory Reform. Smith said he plans to use the position to champion the rights of private property owners.

"Millions of American small property owners are grinding under the heel of regulators run amok," Smith said Friday. "Our challenge is to protect the environment sensibly and at lower cost to individual property owners. No longer will individuals see the value of their holdings cut in half by the arbitrary stroke of a bureaucratic pen."

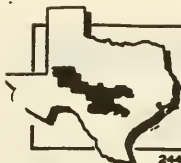
Five Leader's Task Forces were created to serve as advisers to the committees of jurisdiction and the majority leadership in pushing provisions of the Contract with America through to passage. The Contract's Job Creation and Wage Enhancement Act includes provisions to strengthen the rights of property owners.

Smith, who serves on the Judiciary and Budget committees, has been a long-time advocate of private property rights. He recently introduced a bill with Sen. Kay Bailey Hutchison of Texas placing a moratorium on new listings of endangered species until the Endangered Species Act comes up for review. Another Smith bill providing litigation relief to those seeking compensation for regulatory "takings."

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Committee on the Budget • Committee on the Judiciary
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NEWS from

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**SMITH, STENHOLM, AND SENATE LEADERS
LAUNCH BIPARTISAN PROPERTY RIGHTS COALITION
House-Senate Group to Push Issue on a Variety of Fronts**

FOR IMMEDIATE RELEASE

February 6, 1995

WASHINGTON, D.C. — Congressional leaders of both parties today announced the formation of a bipartisan House-Senate coalition dedicated to fighting for the rights of private property owners.

Congressman Lamar Smith of Texas founded the Congressional Property Rights (CPR) Coalition along with other advocates and the chairs of House committees with jurisdiction over the issue. Senate founders include Larry Craig, Orrin Hatch, and Howell Heflin (see attached letter).

"The CPR Coalition's mission is nothing less than reviving liberty in America in the 1990s," said Smith. "From Washington D.C. to Alaska, property rights are under siege by an army of unelected, overzealous regulators."

The CPR coalition is dedicated to raising public awareness of the issue, rather than focusing on a specific bill or bills, Smith said, adding: "We're not picking the battles, we're supplying the troops."

"For too long, the Constitution has been trampled by renegade bureaucratic vigilantes at the Interior Department and the Environmental Protection Agency," Smith said. "This is the Congress that will make them stop."

Co-founder Charlie Stenholm added: "We must have some type of checks and balances system in place to ensure that the rights and well-being of birds, animal and other species are not put ahead of the rights and well-being of private property owners. The CPR Coalition will help to ensure that the rights of property owners are fully considered."

"This broad-based approach is precisely what property rights advocates have yearned for over the years," said Nancie Marzulla, president of the Washington, D.C.-based Defenders of Property Rights. "Every bill has a better chance of success because of this effort."

Smith, who sits on the Judiciary and Budget committees, has introduced a number of property rights-related bills. He was recently named to the Majority Leader's Task Force on Regulatory Reform, where he is focusing on property rights.

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Committee on the Budget • Committee on the Judiciary
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NEWS from

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SMITH TESTIFIES ON PROPERTY RIGHTS

FOR IMMEDIATE RELEASE

February 15, 1995

WASHINGTON, D.C. -- Congressman Lamar Smith was one of the three members of Congress to testify before the Agricultural Subcommittee about the urgent need for Congress to enact legislation to protect private property rights. "It's time for Congress to stop the silent encroachment of overzealous regulators...and until we act, the basic freedoms and liberties of our citizens will remain imperiled by an overreaching, encroaching government," Smith stated.

"Whether the government wants private property for a highway or for a wildlife preserve, the effect is the same: the property is useless to the landowner because it is being used by the government," Smith said. "Unfortunately, both cases are not treated the same. While individuals whose property is condemned are paid, private property owners whose property is made useless by governmental regulations are denied fair compensation... Our Constitution has a cure for these abuses. It's called the Fifth Amendment and it's time that Congress applied this fundamental right to cover all Americans."

Smith has recently co-founded the Congressional Property Rights (CPR) coalition. A coalition formed to fight for the private property constitutional rights of every citizen. He sits on the House Judiciary and Budget committees.

A copy of the statement is attached.

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- 30 -

Committee on the Budget • Committee on the Judiciary
Chair, Subcommittee on Immigration and Claims • Subcommittee on the Constitution

Mr. Chairman, thank you for convening today's historic hearing on the need for Congress to act immediately to protect private property rights.

If the government wants to put a highway in your backyard, the Fifth Amendment to the Constitution requires fair compensation. If a government agent decides to use your property to preserve an endangered species, it should also have to pay for the property. Whether the government wants private property for a highway or for a wildlife preserve, the effect is the same: the property is useless to the landowner because it is being used by the government. Unfortunately, both cases are not treated the same. While individuals whose property is condemned are paid, private property owners whose property is made useless by governmental regulations are denied fair compensation. Their Fifth Amendment rights are ignored. Regulations that prohibit individuals from productively using private property, or require landowners to jump through complicated hoops to use their own land as they please, have become commonplace. Small business owners, family farmers, and small landowners suffer today under a regulatory regime that makes public servants the capricious masters of the American people.

Our Constitution has a cure for these abuses. It's called the Fifth Amendment and it's time that Congress applied this fundamental right to cover all Americans.

On November 8, 1994, the American people demanded that their government shrink in size and power. Our citizens mandated a return to the principles contained in the Constitution. We in Congress cannot fulfill the people's wishes until we act to ensure that the Fifth Amendment rights of our citizens are protected. Restoration of private property rights is essential to the revival of freedom in America.

The Fifth Amendment to the U.S. Constitution provides that private property "shall not be taken for public use without just compensation." This fundamental guarantee was enshrined in our Constitution because our nation's Founders understood that the liberties of all citizens needed to be protected from the insatiable appetite of government. As President George Bush noted, "By protecting a person's earnings and savings, a person's home or a small businessman's stake from unfair confiscation or ruinous overregulation, this principle seeks to protect the whole of society from glutinous government."

Today, a flood of government regulations from Congress, the Environmental Protection Agency, Fish and Wildlife Service, Department of Labor, and other bureaucracies threaten to extinguish the flame of liberty. Across our nation, hard working citizens are denied the productive use of their private property.

- In the Hill country of Texas, 33 counties have been designated as "critical habitats" for the golden-cheeked warbler. Landowners in these counties are threatened with regulations which would render private property useless and valueless.
- In Florida, Ocie Mills and his son Carie spent 21 months in federal prison for depositing sand on residential lots that they owned.
- In New York City, Peter Sursdarsky, a real estate developer, went bankrupt leaving \$20 million in debts because the New York Transit Authority held up his building permit by refusing to designate whether it wanted a subway easement under his property. These stories are just the tip of the iceberg.

These regulatory takings are permitted to occur because the courts have not provided uniform protection to private property rights or held the Fifth Amendment in all cases. Landowners whose private property is taken face costly litigation hurdles that prevent all but the very richest from standing up for Constitutional rights. Government attorneys employ procedural defenses to prevent courts from even hearing the merits of Fifth Amendment claims. Limited access to the courts for redress of basic Constitutional rights undermine the very concept of "equal justice under law."

Even when courts do hear Fifth Amendment cases, decisions are often *ad hoc*, fact specific, and arbitrary. Protection of Constitutional rights often depends upon the vagaries of the court docket or the selection of the judge.

The 104th Congress must act to correct these problems. Private property rights legislation is needed that accomplishes the following goals:

- Affirm the Constitutional right of all Americans against uncompensated governmental takings of private property
 - Provide a fixed and consistent definition of when confiscatory government regulations require compensation under the Fifth Amendment
 - Remove the hurdles that prevent middle class citizens from enforcing their Fifth Amendment rights in the courts
- Congress has before it numerous proposals to protect private property rights. I have authored two of these proposals, the Private Property Rights Litigation Relief Act of 1995 and the Farm, Ranch & Homestead Protection Act of 1995 and am pleased to be an original co-sponsor of numerous other bills, including the excellent proposal in the Contract with America. The test of each bill must be whether it accomplish these basic goals. It's also important to remember what private property legislation would not do.
- Private property legislation would not pay people not to pollute. Each of the major property rights bills proposed explicitly exempts those whose activities constitute nuisances under state law from receiving compensation.
 - Private property legislation would not impact state or local zoning laws. The major property rights bills before Congress do not apply to state and local activities.
 - Private property legislation would not prevent the government from accomplishing important health, safety and environmental objectives. This point is particularly important. Some who support extensive government regulations have propounded the myth that private property rights and environmental protection are inconsistent. In reality, environmental goals would be significantly enhanced if environmental policies encouraged private ownership and stewardship of natural resources. Private ownership would permit environmentally conscious individuals and organizations to purchase and protect vital habitat and empower stewards to preserve fragile resources. I am hopeful that this Committee and all of Congress will be able to enact free market environmental policies to more effectively protect the environment without trampling upon the fundamental rights of our citizens.

More than 200 years ago, James Madison observed that "there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations." As today's witnesses remind us, this warning is as valid today as it was in Madison's time.

Congress must stop the silent encroachment of overzealous regulators and end the erosion of private property rights in America. Until we act, the basic freedoms and liberties of our citizens will remain imperiled by an overreaching, encroaching government. (END)



NEWS from

21st District Texas

Congressman

Lamar Smith

2443 Rayburn House Office Building • Washington, D.C. • 202-225-4236

February 23, 1995, 3:00 p.m.

Washington, D.C.

For Immediate Release

CONGRESS ADOPTS BIPARTISAN AMENDMENT ADDING SMITH ENDANGERED SPECIES PROVISION TO MORATORIUM BILL

Congress today unanimously approved an amendment to the Regulatory Transition Act based on Congressman Lamar Smith's Farm, Ranch & Homestead Protection Act. The amendment, offered by a bipartisan group lead by Congressmen Gary Condit, Lamar Smith, Larry Combest, Jimmy Hayes, Henry Bonilla and Chet Edwards, would impose a moratorium on listings of endangered or threatened species or designations of critical habitat under the Endangered Species Act.

"I'm pleased that Congress has finally acted to protect the most endangered species of all: America's working families," said Smith. He added, "Until Congress re-authorizes the Endangered Species Act to balance common sense and the rights of property owners with environmental concerns, we must protect the American people by putting regulators on the leash."

The moratorium would remain in effect until either Congress re-authorizes the Endangered Species Act or December 31, 1996 (the end of the 104th Congress). The amendment extends the moratorium on new regulations beyond the one year contained in the Regulatory Transition Act.

"The Endangered Species Act has destroyed the rights of hard-working, tax-paying American families for the sake of blind cave spiders, fairy shrimp, and golden-cheeked warblers," stated Smith.

The moratorium on Endangered Species Act listings was first introduced by Congressman Smith's Farm, Ranch & Homestead Protection Act in the 103rd Congress. Congressman Smith re-introduced the legislation in the 104th Congress.

February 23, 1995, 3:00 p.m.

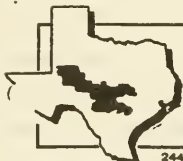
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NEWS from

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March 3, 1995

For Immediate Release

SMITH CENTRAL PLAYER IN SUCCESSFUL PASSAGE OF FIRST EVER PROPERTY RIGHTS PROTECTION BILL

The House of Representatives Friday passed the first ever legislation protecting private property rights from governmental over-regulation, a goal for which Congressman Smith has worked since his election to Congress in 1986. Congressman Smith, the founder of the Congressional Property Rights (CPR) Coalition and author of two bills to protect private property, hailed passage of the bill as a "great win for freedom and for civil rights across this nation."

"This bill will provide relief to today's forgotten Americans -- citizens denied the productive use of farms, ranches, and homesteads often acquired after a lifetime of work," Smith said. "Through a bipartisan effort in the people's House, they are forgotten no longer," he added.

The Private Property Protection Act of 1995 passed by 277-148. The legislation was hammered out through cooperation between the Republican leadership, Congressman Charles Canady, Chairman of the House Constitution Subcommittee of the Judiciary Committee, Congressman Smith, Congressman Richard Pombo (Rep- California), and a coalition of conservative Democrats led by Congressman W.J. (Billy) Tauzin of Louisiana.

The bill requires compensation for landowners forced to bear certain Federal restrictions on the use of their private property, if those restrictions diminish the value of a portion of their property by 20% or more. Landowners whose property is reduced by 50% or more in value may request that the government purchase the affected portion of their property.

Successful passage of the Private Property Protection Act of 1995 also completes House work on a series of regulatory reforms contained in the Job Creation and Wage Enhancement Act. Part of the Contract with America, those reforms include a regulatory moratorium, cost-benefit analysis, and private property rights, among others.

Smith has been an active proponent of these reforms. Last week, Smith led a bipartisan effort to extend the regulatory moratorium for Endangered Species Act listings and designations.

"This is a great day for the people who do the work, pay the taxes, and pull the wagon," Smith said. "By protecting our families, communities, and businesses from big government regulations, we will work to revive the American Dream."

###

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TEXAS DEPARTMENT OF AGRICULTURE

RICK PERRY
Commissioner

Testimony
of Texas Agriculture Commissioner Rick Perry
to the U.S. House of Representatives Task Force on Endangered Species
March 20, 1995
Boerne, Texas

Texans know first-hand the serious problems with the Endangered Species Act and are pleased to have the opportunity to present our concerns to members of Congress who can fix this badly broken law.

I know that Interior Secretary Bruce Babbitt has proposed changes to the Act and its implementation which he says would increase the flexibility of the act and decrease economic impact. While I applaud the language, I won't be satisfied until we see this become reality. We've heard this kind of "don't worry" rhetoric from U.S. Fish and Wildlife before, and have usually paid the consequences when we fell for it. We want to see it in writing and in practice!

Another problem with Secretary Babbitt's plan is that it would exempt landowners with five acres or less from complying with the act. Although it would quiet suburbanites who want to build homes in the Hill Country, it would throw even more of the burden of protecting species onto agriculture producers who traditionally own larger tracts. This proposal is nothing more than an aspirin that would cure a minor headache but won't begin to cure the patient. This proposal is not fair, and I suspect it will not stand up under judicial review.

The foundation of the law is flawed and patching cracks here and there won't solve the problems. We must construct an Endangered Species Act that protect property rights as well as species. I don't believe the current act does either.

I recently testified before the U.S. Senate Committee on Environment and Public Works Subcommittee on Drinking Water, Fisheries and Wildlife in support of a six-month moratorium on adding species to the endangered list. I believe this is crucial until we fix the Act.

You will hear from many Texans today who feel the same way – honest, hard-working folks who enjoy wildlife and nature but have been blind-sided by the federal government.

Texas has been hit harder by the Endangered Species Act than many states because 95 percent of Texas property is privately owned – and as you well know there's an awful lot of property in our state. Because of our land mass, Texas has a wide variety of soils, climates and ground cover, which leads to a diversity of wildlife and habitat.

Texas currently has 67 species that are federally listed as endangered or threatened. We have another 164 candidate species (*includes potentially endangered, C1 and C2*). Each of these listings brings more regulations and more restrictions on what a person can do with the property he or she owns. Each listing creates animosity, which hurts rather than helps promote species protection.

Texans have fought several battles over the Endangered Species Act recently and know all too well what these restrictions can do. Central Texas has 33 counties affected by the endangered golden-cheeked warbler. Individuals as well as developers have been prevented from building homes on their land. Many of those individuals will tell you their stories later today.

Farmers and ranchers face restrictions on simple day-to-day management decisions such as brush control and the number of cattle they can run on their land. In 1991, Margaret Rodgers received a letter from the U.S. Fish and Wildlife Service that warned of fines of up to \$50,000 or imprisonment. Her crime? A bulldozer cut a fence line across the 87-year old widow's Central Texas ranch. While Fish and Wildlife eventually admitted it overreacted, they told her to check with them before clearing any more land. All this for a bird that has lived on Texas ranches for generations.

The city of San Antonio and farmers in surrounding counties have had their water supply threatened by a continuing Sierra Club lawsuit aimed at ensuring there is adequate water to protect two salamanders and two minnows that live in springs fed by the Edwards Aquifer. (*species are: Texas blind salamander, San Marcos salamander, fountain darter, San Marcos gambusia*)

These are not fabricated or isolated incidents. The Endangered Species Act and its implementation restrict private property rights. The Endangered Species Act and its implementation restrict people's right to make a living. The Endangered Species Act and its implementation have gone too far and must be rectified to value people's rights as much as those of plants and animals.

We believe that habitat exists today because of good stewardship by farmers and ranchers. Most farmers and ranchers take pride in having wildlife on their land and are willing to do their part – if it makes any sense at all.

But it's a lack of common sense in the Endangered Species Act and its enforcement that has Texans irate.

In Texas today, four species are being proposed to be added to the endangered list. One – the jaguar – has not been seen in Texas since 1948. Two in West Texas – the swift fox and the Arkansas River shiner – are being pushed for listing by the U.S. Fish and Wildlife Service despite the fact that the Texas

Parks and Wildlife Department says biological information does not support listing. This is the same department that Secretary Babbitt recently praised as being one of the best in the nation.

The fourth – the Barton Springs salamander – was proposed for listing in February 1994. Recently, Secretary Babbitt postponed for another six months a decision on whether to list the salamander. One reason is that after a year of research they still do not have scientific evidence to document listing the species.

Again, this raises the question of common sense. If a species is truly endangered, can it survive more than a year of bureaucratic bumbling? If after a year of research an agency can't come up with scientific data to support a listing, then I suggest the agency is incompetent or the species is not endangered.

I would wager that if it had not been for vocal Texans saying they've had enough of this kind of nonsense, all four species would have been quietly added to the list – and Texans would be laboring under more restrictions.

The Texas backlash against the Endangered Species Act can be traced directly to many things, but one thing especially sticks in Texans' collective craw – the failure by the U.S. Fish and Wildlife Service to provide adequate, sensible information, in a timely manner, to those who make their living on the land and who own the vast majority of the wildlife habitat in Texas.

Fish and Wildlife's arrogant refusal to respond to the needs of the owners of habitat is hurting legitimate wildlife conservation efforts. The Endangered Species Act has become a major negative force for conservation. The Endangered Species Act works against good stewardship and makes the presence of an endangered species on property a liability rather than an asset.

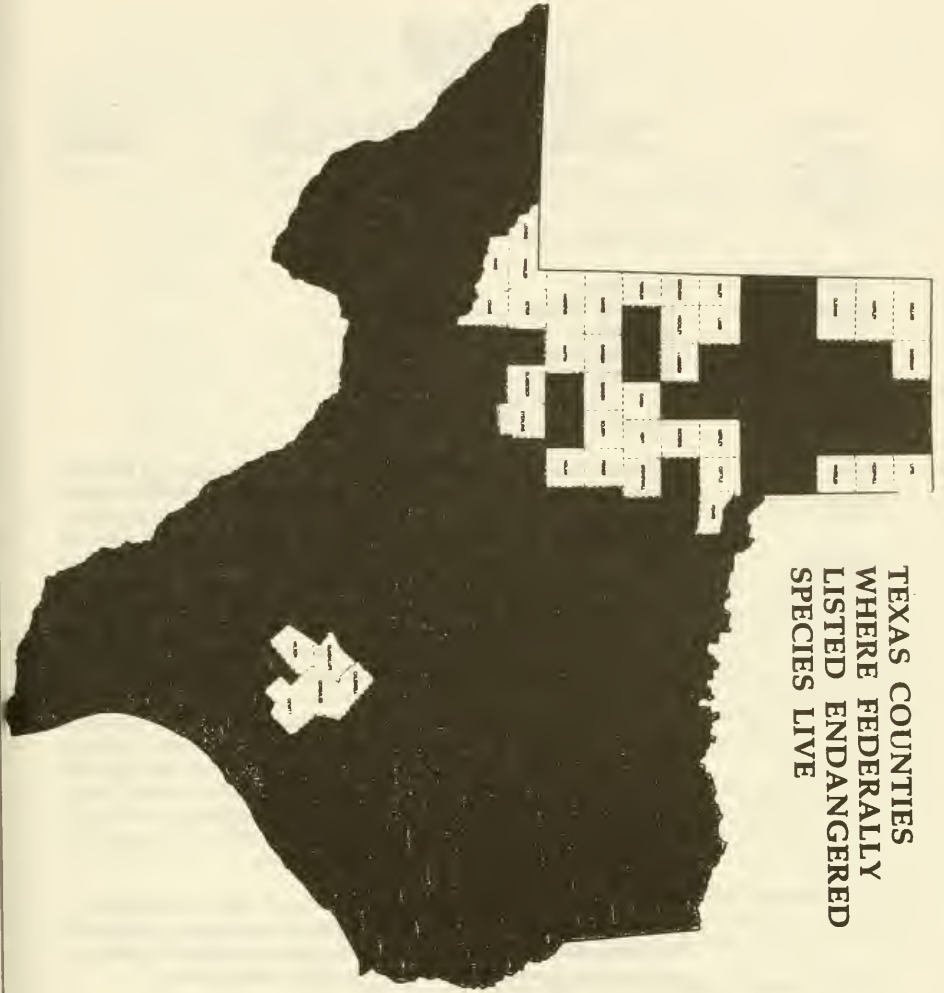
Ranchers don't want to, and under the fifth amendment to the U.S. Constitution shouldn't have to, clear their daily management decisions with some distant federal bureaucrat. But today they must, which unfortunately creates a real economic incentive to destroy habitat — not because of animosity

toward species and not because it will make money — but because of a real fear of federal control.

We support wildlife in Texas. Wildlife populations are flourishing in our state — because of the stewardship of farmers and ranchers who own the land. This didn't come about because of legislation and regulations. This came about through positive, cooperative efforts, not federal coercion.

Give Texas farmers and ranchers valid scientific information that a species is endangered. Tell them how to help conserve that species and still make a living. And they will respond. We do not want to do away with protection of endangered species. We do not want to destroy the environment. We do not want to destroy wildlife.

We do want information we can believe. We do want solutions that work and will actually increase species populations. We do want to be able to make a living. None of this is happening as the Endangered Species Act is written and enforced today.





**TEXAS
PARKS AND WILDLIFE DEPARTMENT**
4200 Smith School Road • Austin, Texas 78744 • 512-389-4500

ANDREW SANSON
Executive Director

COMMISSIONERS
YONACIO D. GAFZA
Chairman, Externado

WALTER LUMPHREY
Vice-Chairman
Bosman

September 30, 1994

LEE M. BASS
P. Worth

MICKEY BURLESON
Temple

RAY CLYMER
Wichita Falls

TERRIE TAPLTON HEATHLEY
Houston

GEORGE C. "TIM" HIXON
San Antonio

WILLIAM F. MOOREY
Houston

JOHN WILSON KELSEY
Houston

PERRY R. BASS
Chilman-Estados
P. Worth

Ken Collins
Ecological Services
Field Office
222 South Houston, Suite A
Tulsa, OK 74127

Dear Mr. Collins:

The Texas Parks and Wildlife Department would like to record the following comments with respect to the proposed rule, published in the Federal Register (Vol. 59, No. 148), to list the Arkansas River shiner (*Notropis girardi*) as federally endangered. Our biological evidence does not warrant listing the shiner as endangered in Texas. In 1983, our biologists collected 786 Arkansas River shiners out of a total of 3,141 fish from 34 samples above Lake Merideth on the Canadian River. In 1990, we recorded 309 individuals of this species from 3 samples on the Canadian River near the town of Canadian downstream from Lake Merideth. From these data, we conclude that the Texas population of the Arkansas River Shiner is neither threatened nor endangered.

In order to gain more information, we are about to initiate an effort to monitor the species within the Canadian. We will be obtaining data on why the species is doing well in Texas and assess the possible threats. Our biologists state that the Ogallala Aquifer is too far below the surface to contribute to the flow in the Canadian River. Therefore, pumping from the Aquifer does not pose a threat. We will, of course, share the results of these efforts with your staff to further conserve the species in other parts of its range.

There is a great deal of interest in this issue from Austin to the panhandle. Several other interested parties are in the process of developing a response to the proposed rule. Consequently, we would support a request for an extension on the comment period for this rule before public hearings begin.

Sincerely,

Larry McKinney
Director, Resource Protection Division
LM:GLG:glg

ANDREW SANSON
Executive Director

4400 Smith School Road • Austin, Texas 78744 • 612-389-4800

July 27, 1994

Ms. Elizabeth McPhillips
Acting Field Supervisor
Ecological Services
U.S. Fish and Wildlife Service
420 South Garfield Avenue, Suite 400
Pierre, South Dakota 57501-5408

Dear Ms. McPhillips,

This is a letter to comment on the Notice of 90-Day Petition finding to federally list the swift fox (*Vulpes velox*) as endangered.

The status of the swift fox is currently unknown in Texas and is considered to be a furbearer under state law. Our recent trapping reports indicate that the fur returns on this species is too low for quantitative analysis, but this may be correlated with decreased trapping effort due to a declining trapper population rather than a decline in the swift fox population. However, we do have several recent undocumented verbal reports of the swift fox in the Panhandle and kit fox in West Texas, but exact locations of these occurrences and whether the populations are increasing, stable, or decreasing is unknown.

Because this species is listed as a Candidate Category 2 species, we have just begun a campaign to gather more information concerning their status, as well as the status of the Plains Spotted Skunk (also C2). The 3 steps in this 1-2 year project that began in February 1994 include:

- 1) soliciting the cooperation of biologists, public land managers, and the general public to report information on the occurrence of swift fox and spotted skunks, whether live populations or road kills,
- 2) adding the swift fox/spotted skunk to the Texas Parks and Wildlife Department's annual deer/furbearer spotlight survey, and
- 3) sending information to the 1993/94 licensed trappers on the proper identification of these species and requesting their cooperation in providing trapping and/or occurrence records.

Only Step 1 has been completed and only 2 sightings of swift fox have been reported in the last 6 months. However, informal discussions with TPWD

8

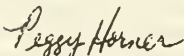
and university biologists have led me to believe that there are probably 'several' populations in the Panhandle and that they may be locally abundant. Step 2 will begin in August, and Step 3 will begin in late October/early November. The open fur season does not end until January 31, 1995, so results of our efforts described above are not expected until Spring of 1995. At that time, we will assess the situation and establish further goals.

The statement in the Notice of 90-Day Petition Finding (Fed. Reg. 59:104), states that "Kansas, Texas, and Wyoming maintain localized populations with limited distributions." At this time, undocumented reports indicate that the swift fox population in the Texas Panhandle may be localized, however, we have no biological data to support the statement that the populations have limited distributions.

Until the above information is obtained and analyzed, we can not concur that the swift fox is endangered in Texas. The biological evidence in Texas does not warrant the listing of this species. However, we are interested in obtaining this information, and with more time, we hope to be able to resolve some of these questions. Therefore, we believe the current listing for the swift fox as a Candidate Category 2 species is appropriate.

When we complete our campaign for information requests concerning this species, we will provide you with a copy. If you have any further questions, please do not hesitate to contact me at (512) 448-4311.

Sincerely,



Peggy Horner

Endangered Resources Branch

cc: Alisa Shull, Listing and Recovery Coord., USFWS/Ecol. Serv.-Austin
Don Wilson, Furbearer Coord., TPWD/Wildlife Branch-Austin
Danny Sweptson, District Leader, TPWD/Wildlife Branch-Amarillo

ECONOMIC FOCUS

Rural Land Owners Say Pain Goes Beyond Data

12/2/94

By SUSAN WARREN

Staff Reporter of THE WALL STREET JOURNAL

Are endangered plants and animals dangerous to rural property owners? Choose a side.

According to a new study by the Texas and Southwestern Cattle Raisers Association, the answer is "yes, very." By analyzing property-tax rolls around the state, the study attempts to show that land values in 33 environmentally sensitive counties have fallen much faster than the state average over the past four years, due in part to enforcement of the federal Endangered Species Act.

Not surprisingly, the association's conclusions are drawing fire from environmentalists. And a professor at the Massachusetts Institute of Technology has weighed in to say that the study actually proves the opposite of what ranchers claim.

If nothing else, the flap about the study shows just how tough it can be to

The association bolstered its examination of tax records with a survey of statements made by real-estate professionals, rural landowners and local government officials citing the Endangered Species Act's negative impact on land values.

"If the real-estate experts say it's a problem, and local elected officials say it's a problem, and we know from first-person reports that it's a problem, then there's more here than just smoke," Mr. Munday says.

The group's effort came after federal authorities caused a near-panic among landowners earlier this year when they considered designating 33 Central Texas counties as "critical habitat" for the endangered golden-cheeked warbler, a songbird that nests in the region. That plan — which mainly would have placed additional restrictions on some uses of the land — was later shelved under heavy political fire.

But even without the special designation, those counties are already grappling with restrictions because they are home to 19 other endangered species. Property owners who play host to such plants and animals face strict limits on what they can do with their land, including any new developments that might imperil their endangered guests.

To see whether those restrictions translate into lower land values in the countryside, the Cattle Raisers Association took a look at property-tax rolls across the state. The study found that average rural land values in the 33 counties declined 25.3% between 1989 and 1993 — significantly more than the statewide drop of 22.2%.

But Stephen Meyer at MIT, who directs the school's Project on Environmental Politics & Policy, says the association made a basic analytical error. The problem, he says, is that the 33 counties include Bexar and Travis counties, by far the most populous in the study. Because of the proximity to urban areas (Austin is located in Travis County, while San Antonio is in Bexar County), rural land in those counties was much more valuable to begin with, and represented a disproportionate amount of the value in the 33-county sample. It's likely that values dropped much more in Bexar and Travis counties than in the others when the speculative bubble burst in the late 1980s, Mr. Meyer maintains.

Minus the two big counties, average values in the remaining 31 fell just 17.8%, far less than the state average. In fact, land values in 22 of the 33 counties did better than the state average, Mr. Meyer says.

In some cases, the endangered species might have actually helped land values, says Mr. Meyer. He says it makes sense when you consider that species-free land might command a higher price when some land with endangered species habitat becomes undesirable.

That's little comfort to residents of habitat-sensitive land. And the cattle association and real-estate market specialists point out that some problems faced by landowners when trying to sell their property within a suspected habitat area aren't necessarily reflected in tax records. For instance, property that's encumbered by endangered species might be impossible to sell at any price. And landowners whose property doesn't have such problems often must pay for expensive and time-consuming biological surveys to prove it before a prospect will agree to buy or a bank will finance the sale.

Such surveys can cost anywhere from \$10,000 to \$50,000, depending on the size of the tract. Steve Paulson, director of the Texas office of SWCA Inc., an environmental consultant that provides such services, says business is booming. Without a survey, there is uncertainty, he says. "And wherever there's uncertainty, there's volatility in the market."

That's something George Foote knows about firsthand. Back in 1961, Mr. Foote invested in 50 acres of land outside Austin with the idea that he could sell it in his retirement years. Now, Mr. Foote, 74 years old, can't find a buyer because wildlife officials believe it's a habitat for the golden-cheeked warbler.

Several buyers have expressed interest, but they quickly lose it when warblers are mentioned, says Mr. Foote. If it's warbler habitat, then it can't be cleared to build a house or road — the most marketable use for the property, he says.

"That leaves me with land that has no value," he says. "unless I want to lie to prospective buyers, and that's certainly not the thing to do."

Looking Over the Land

Environmentally sensitive counties evaluated in land-value study by the Texas and Southwestern Cattle Raisers Association

Going Downhill

Percentage change in land values during past four years

	Land values (in billions)	% Change from 1989
Rural Texas	\$81.78	-22.2%
33 environmentally sensitive counties	15.2	-25.3
31 counties, excluding Travis and Bexar	12.5	-17.8

Sources: Stephen Meyer, MIT Project on Environmental Politics & Policy; Texas and Southwestern Cattle Raisers Association

apply hard numbers to the highly emotional battle between property-rights advocates and environmentalists. "It's difficult to get your hands on something that will isolate that effect [on property values] conclusively," says Charles Gilliland, an associate research economist at Texas A&M's Real Estate Center.

Steve Munday, a spokesman for the Cattle Raisers Association, says looking at the study purely from a statistical point of view misses the bigger picture.

A spirit of cooperation brings new solutions to old issues

THE WE DECADE:
REBIRTH OF COMMUNITY

By Michael Precker

Staff Writer of The Dallas Morning News

LAGUNA ATASCOSA NATIONAL WILDLIFE REFUGE, Texas — Another rare bird could be in trouble, and environmentalists are worried.

Farmers' pesticides may be harming the white-winged dove, one of about 400 species that make this area one of North America's great bird sanctuaries.

Steve Thompson of the U.S. Fish and Wildlife Service, who manages the refuge along the South Texas coast, knows just what to do. He calls the farmers for help, and a meeting is set for April.

"The old way a few years ago was that we probably would have gone straight to the press and yelled," Mr. Thompson says. "We wouldn't even have known where to find somebody in a culture. So right away they'd be mad at you and you'd be mad at them."

There's a new way in Cameron County, the southeast tip of Texas where the Rio Grande meets the Gulf of Mexico. Farmers and environmentalists are forging a spirit of cooperation that is getting noticed around the country as it solves problems at home.

"To our knowledge, it's the first time people from such a broad spectrum came together in Texas," says Jane Moore, coordinator for endangered species pesticide protection at the Texas Department of Agriculture. "We're modeling. Please see ENVIRONMENTAL on Page 8C."

our effort statewide after what they did."

Diana Hines, an environmental scientist with the federal Environmental Protection Agency's regional office in Dallas, calls the Cameron County program "wildly successful. If you educate people and they feel they've had a say, they're more likely to do what is right."



Larry R. Ditto photo

Those attitudes are being reflected around the country.

Businesses pledge to protect the environment. Communities band together to save a natural resource. Industrialists and environmentalists discuss "sustainable development" — the concept that their interests can coexist.

"We would rather try to forge common solutions to protect the environment instead of standing on the outside and criticizing," says Lisa Swan of the Environmental Defense Fund, which has adopted an approach of working with companies rather than taking them to court.

"Environmental considerations today are paramount in virtually every business decision we make," says Dale Heydlauff, vice president of environmental affairs at America Electric Power Co. in Columbus, Ohio. "Believe me, that wasn't the case four years ago. ... We don't like to be the bad guys any more."

In Cameron County, the partnership started with a bird that hadn't been seen around the area for a half-century: the Aplomado falcon, a bright-eyed, sharp-beaked predator with a bright yellow neck.

Trying to save the endangered species, a private group called the Peregrine Fund began breeding Aplomado chicks in the mid-'80s and bringing them to the Laguna Atascosa refuge to release. But in 1987 the EPA decided that pesticides used by farmers in the area imperiled the birds' survival.

"One day I got a map in the mail with a list of chemicals that the county wouldn't be allowed to use," says Terry Lockamy, Cameron County agricultural extension agent. "The bottom line was we were not going to be able to plant cotton in Cameron County."

Cameron County farmers also grow citrus, sorghum and sugar cane, but cotton is still king. Estimates of cotton's impact on the border county, which includes the towns of Brownsville and Harlingen, ranged from \$100 million to \$300 million.

The initial impulse was to fight. Then, says Wayne Halbert, a farmer who also heads the local irrigation district, a few people had another notion.

(continued)

"A group of us were having coffee and we thought, 'Why don't we try to do something positive?'" he says. "Let's at least sit down and see what this is really about." †

Mr. Halbert and Mr. Lockamy set out to convene a group representing all sides: farmers and pesticide suppliers, wildlife experts and environmentalists.

Rose Farmer, who manages the Sabal Palm Grove Sanctuary near Brownsville, says some fire-brand environmentalists stopped speaking to her when she agreed to join the committee.

"You can't close down a whole industry and say you've won something," says Ms. Farmer, whose nature reserve belongs to the National Audubon Society. "I'm a firm believer in starting at the local level and seeing if there's a way you can sort it out."

Still, many of the opposing interests had never even met when they first eyed each other warily around a table.

"My gut reaction was that if they're just going to beat up on me, I've got a lot better things to do with my time," recalls Mr. Thompson.

"Most of us thought this wouldn't be anything but a big dogfight," Mr. Halbert says.

Initially, they weren't far off. At some early meetings, Mr. Halbert says, "Farmers were jumping up and saying, 'You're taking away our livelihoods.' Environmentalists said, 'You're killing all the species.' Everyone was pointing fingers at each other."

Most participants praise Mr. Lockamy for keeping the group together.

"Our goals weren't that different," he says. "The idea was that no one person has the answers. Everybody has a piece of the puzzle. We just have to figure out how it all fits together."

The group won official recognition from county commissioners as the Cameron County Agriculture and Wildlife Coexistence Committee and drafted a mission statement that aimed to protect endangered species while keeping agriculture viable. Members vowed to deal with facts, not emotions, and went to work.

About a half-dozen people formed the core, with another two dozen sporadically taking part. They invited experts, amassed data on pesticides, studied the Aplomado falcon and looked for ways to coexist.

It took a couple of years to build trust, but it happened. Farmers came to Laguna Atascosa to watch young Aplomado falcons released into the wild. Environmentalists learned that farmers don't randomly dump poisons in their fields.

"For one thing, it's expensive," Mr. Halbert says. "And my kids are out there."

Understanding and education led to changes. Farmers have stopped using several pesticides, found safer alternatives and altered application methods. For example, birds were dying from eating a granular pesticide that looked like food.

Farmers switched to a liquid form that the birds left alone.

"I don't want you to think that we all love each other," Mr. Lockamy says. "There's still lots of scar tissue. But there's a lot more friendships out there now than enemies, and there's a lot more cooperation than ever before."

Compliance is still voluntary, Mr. Halbert says, but nearly universal: "Ninety percent probably make adjustments on their own, and peer pressure usually works on the rest."

Progress is hard to measure. The EPA still has not imposed mandatory restrictions, and it's too soon to tell whether the Aplomado falcon will flourish again in South Texas.

Of the 62 released so far, about one-third are known to have died, mostly victims of predator owls. But between 30 and 50 more chicks are scheduled to be released each year, and Mr. Thompson believes he has spotted the first pair of mature birds embarking on a meaningful relationship.

And the intangibles seem only positive. A couple of years ago an ocelot — a highly endangered species of wild cat — was found poisoned by a pesticide. Rather than call the media and provoke a con-

frontation, Mr. Thompson called the farmers, who searched sales records for the poison to track down the culprit and contributed money for a reward.

The pesticide had been used illegally in a bait trap, not for agriculture. Mr. Lockamy says the farmers believe they know who did it, though no one was ever prosecuted. It hasn't happened again.

"That was a positive result that wouldn't have happened without this cooperative spirit," Mr. Thompson says. "To me, that's a sign we have a nucleus of people who can work together to solve problems."

The lessons of Cameron County are beginning to reach far beyond South Texas. A video about the program is being distributed to Agricultural Extension Service offices nationwide, and committee members have spoken at conferences around the country.

Ms. Farmer of the Audubon Society still has a long list of environmental concerns in the Rio Grande Valley: disappearing wildlife habitat, a polluted river,

rapid population growth on both sides of the border and rapid industrialization, particularly in Mexico.

"The pressures here are immense," she says. "If I have any kind of optimism, it's because of groups like this. We need to be doing lots of coalition-building. I'm just hoping it's happening fast enough while there's still something left."



The Dallas Morning News

TESTIMONY OF
MAYOR NELSON W. WOLFF

ON BEHALF OF THE CITY
OF SAN ANTONIO

BEFORE THE TASK FORCE ON
ENDANGERED SPECIES

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

BOERNE, TEXAS
MARCH 20, 1995

TESTIMONY OF
MAYOR NELSON W. WOLFF
ON BEHALF OF THE CITY
OF SAN ANTONIO
BEFORE THE TASK FORCE ON
ENDANGERED SPECIES
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
BOERNE, TEXAS
MARCH 20, 1995

Mr. Chairman, members of the Committee.

As Mayor of San Antonio, the nation's ninth largest city, I appreciate this opportunity to tell you how the Endangered Species Act and the litigation it has engendered has been threatening the City for many years.

The millions of dollars all the lawyers are making in the Edwards Aquifer case could have been better used to protect endangered species and their habitat. The Endangered Species Act is being used effectively to preserve lawyers, who are not an endangered species, and not to help preserve the environment through the acquisition of additional land for habitats for endangered species.

This is the third time I have had the opportunity to testify before Congressional committees on the need to provide balance in the Endangered Species Act.

On April 1, 1993, I testified in Washington, DC before the Committee on Merchant Marine and Fisheries on how the Endangered Species Act in the case of the Edwards Aquifer is being used to restrict and curtail access to the most precious of resources: water... how it is being interpreted to bring enormous cost and hardship to a relatively poor city whose majority population is made up of minorities... how a region of 1.5 million people is being asked to manage its water supply exclusively to protect endangered species, without regard to either economic costs or human consequences.

On July 6, I testified in San Antonio, and expressed the hope that legislation passed by the Texas legislature with support of the City of San Antonio and the remainder of the region, would allow for a balancing of these competing interests without massive economic disruption. The legislation created an entirely new Edwards Aquifer Authority with the power to manage the Aquifer for the benefit of all interests dependent upon it, including the interest of the species at Comal and San Marcos Springs. The legislation has not been implemented because the Justice Department's Civil Rights Division refused to preclear the legislation under the Voting Rights Act, preventing its implementation.

The Edwards Aquifer is the sole source of drinking water for the City of San Antonio and the cities and many of the residents of eight Texas counties ... and indeed, it was the first sole source aquifer designated as such by the U.S. Environmental Protection Agency pursuant to the special provisions of the Safe Drinking Water Act of 1974.

In May, 1991, as a result of the failure of regional discussions on management, the Sierra Club, at the request of the river authority downstream of the springs, brought a lawsuit to force Aquifer users to drastically curtail their existing water use to prevent any harm to several listed species. Instead of suing the thousands of Aquifer users, the Plaintiffs sued the USFWS to force the agency to "protect" the species by defining required springflows and thereby defining necessary usage reductions. On January 30, 1993 Federal Judge Lucius D. Bunton, III issued a ruling under the Endangered Species Act that in order to protect the Fountain Darter... the only known endangered species in Comal Springs... a level of springflow must be assured to prevent a "taking" of the species. The Edwards Aquifer refills rapidly when it rains. During dry periods, levels in the Aquifer decline, causing declines in springflow. The Court's Order in essence requires the region to cease or drastically reduce water consumption, with huge economic and human consequences, to prevent harm to even one Fountain Darter at Comal Springs. The Texas Water Commission has calculated that annual pumpage from the Aquifer would have to be reduced sixty percent to achieve the requirements established by the Court Order. In short, 1.5 million people must replace a huge portion of their existing, historical water supply literally overnight.

Judge Bunton made his ruling even though the Fountain Darter, which is like a little minnow, thrives in the hundreds of thousands in San Marcos Springs, which has never gone dry in recorded history. His ruling threatens this community even though conservation efforts and aggressive demand management measures have kept the City's usage below historic levels despite substantial growth.

Further, the Judge requires protective measures assuming a repeat of a 1950's drought, even though the Texas Water Commission has data that clearly indicates the drought of the 1950s was an extreme event likely occurring only once in a 200 to 300-year timeframe.

Keep in mind that the Judge's ruling under the Endangered Species Act is not about a new project like a dam or a highway. Instead, he ruled that an ongoing, historic activity dating back more than 100 years must be substantially curtailed, even though the activity is a fundamental requirement of human existence in the region.

On March 6 of this year, Judge Bunton issued a further order, a copy of which is attached to my testimony. This order sets a schedule for consideration of implementing the "Emergency Withdrawal Reduction Plan" of the monitor he appointed to advise the Court of the need for emergency water rationing. This Order again puts the citizens of the City of San Antonio, and surrounding communities, at the mercy of judicial brinkmanship. All this to prevent springflows from dropping below an arbitrary level of 200 cfs - when flows have routinely dropped far below these levels in the previous decades with no evidence of either short or long term harm to the endangered species.

The Judge's 1993 and 1995 Orders were issued even though the subject endangered species can and do survive in more than one habitat. When Comal Springs went dry for five and a half months during the 1950's drought, and the species were lost at that location, Fountain Darters from San Marcos were reintroduced to Comal Springs where they now number in excess of 150,000.

They also thrive in large numbers today in San Marcos Springs.

Endangered Species like the Fountain Darter can be collected and maintained in refugia, where they can reproduce, to be reintroduced to areas sensitive to drought conditions. Indeed, portions of Comal Springs' habitat can be preserved during drought conditions using Aquifer wells located nearby which were used throughout the drought of the 50's. In the Edwards Aquifer region, the Act is being used to overturn decades of state law to insure abundant water to water users downstream of the springs, not insure the survival of protected species.

The cost of developing additional water supplies to comply with Judge Bunton's Orders would be in the billions of dollars. Of course, there would be environmental objections to the building of reservoirs or other sources of additional water supply, and the necessary federal permits and financial resources may not even be attainable.

This endless litigation under the Endangered Species Act threatens the economic prosperity and growth of the over one and one half million people of San Antonio and our neighboring farming communities. Businesses will not come to communities that do not have an assured water supply - and businesses that are already there are likely to move.

Projections by Texas Economist Dr. Ray Perryman, presented at trial, show a potential job loss to San Antonio of more than 100,000 - more than 100,000 breadwinners are families without jobs - if Judge Bunton's rulings are allowed to stand. No community can stand such a catastrophic loss.

The threat of actions under the Endangered Species Act have already substantially harmed this community. San Antonio learned early this month that the uncertainty caused by the application of the Act to the region's water supply caused the Pentagon to red-line each of Bexar County's military bases in the Base Realignment and Closure process, a key factor in the Pentagon's recommendation to close Brooks Air Force Base and downsize Kelly Air Force Base. USFWS' demands that the Department of Defense consult with them on any ongoing or future activity in the region likewise costs this region jobs and growth.

The problem for San Antonio is immediate and severe. This is not about litigation to stop future actions or projects, but rather represents the use of the Act to attempt to turn back the clock and ignore decades of reliance on fundamental property rights which allowed this community to grow and prosper.

If the Endangered Species Act is going to preclude the optimum use of an existing resource - one like the Edwards Aquifer which has been used continuously for well over a century, local governmental and private entities should be compensated for the loss - rather than throwing the entire price tag - as Judge Bunton has done - in San Antonio's lap and saying "Good Luck."

If the Federal Government under the Endangered Species Act is going to require the importation of huge quantities of water into Bexar County to protect endangered species (as strongly urged by the Judge in his March 6 Order), then this mandate should be funded by the Federal Government.

The City of San Antonio has one of the lowest per capita uses of water in the United States.

The City of San Antonio is making a serious effort to responsibly manage the valuable water resource of the Edwards Aquifer - its sole source aquifer.

We have a stringent ongoing water conservation plan, a drought management plan and a water re-use plan... and year round restrictions on the use of water.

The City of San Antonio, through its water system, has agreed to pay one-half millions dollars to acquire a 4,800 acre tract of environmentally sensitive land over the Edwards Aquifer recharge zone in order to protect the Aquifer's ability for recharge.

In short, we are doing our part to be responsible citizens and preserve our environment.

But this threat to the City of San Antonio, and the continued waste of millions of dollars in unnecessary litigation costs will not end until the Endangered Species Act is amended to take into consideration ECONOMIC AND HUMAN concerns, and to allow regional management plans like the Edwards Aquifer Authority to work - without reasonable interference from Federal agencies, Federal District Courts, or suits by special interests.

The fundamental flaw in the Endangered Species Act is that in its requirement to provide absolute protection for endangered species, it provides no protection for the human species. The Act lacks a balanced approach.

The City of San Antonio has long supported state legislation establishing a management plan for the Edwards Aquifer to preserve the resource for the future and protect all those dependent upon it, humans and their fellow species. Regional management of the environment, if allowed under the Endangered Species Act, would let us in Texas work hard to be good citizens... to preserve our environment... to maximize the beneficial use of water available for withdrawal from the Aquifer... protect water quality... achieve water conservation... provide water from additional sources to support economic growth... and protect endangered species, without Washington, DC or Federal Court imposed dictates.

We are anxious to preserve our environment, but what we need are common-sense laws and regional management... NOT Federal dictates.

THANK YOU.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

FILED

MAR 16 1995

U.S. DISTRICT CLERK
WESTERN TEXAS

BY jon DEPUTY

SIERRA CLUB,)
Plaintiff,)
GUADALUPE-BLANCO RIVER)
AUTHORITY, et al.,)
Plaintiff-Intervenors,)
v.)
BRUCE BABBITT, in his Official)
Capacity as Secretary, Department of)
the Interior, and THE UNITED)
STATES FISH AND WILDLIFE)
SERVICES,)
Defendants,)
DANNY McFADIN, TOMMY)
WALKER, CARL MUECKE, et al.,)
Defendant-Intervenors.)

MO-91-CA-069

ORDER ON THE SIERRA CLUB'S SECOND MOTION
FOR ADDITIONAL RELIEF

The Court has considered the written and oral arguments of the parties concerning the status and prospects of the Edwards Aquifer, Comal and San Marcos springflows, and that status and prospects of possible solutions to the problems that overdrafting of the Edwards cause for the relevant ecosystems and species. In addition, the Court has discussed the progress of the Monitor's work with the Monitor. Based on the history of this matter, this Court's Amended Judgment and Findings and the foregoing, the Court finds, concludes and orders as follows:

Time Is Running Out

This Court has no desire to take part in the water regulating business. The Court bent over backwards in an effort to give federal, state, regional and local officials every opportunity

to solve the problems of the Edwards without any further Court intervention. The problems have been known for 40 years. This suit is four years old. It has been two years since this Court entered judgment and warned that judicial action within six months was imminent. In all this time, many words have been spoken or written, but very, very little has been done. The Court has no alternative under the law but to do whatever is necessary to keep the Comal and San Marcos Springs flowing, not only for the endangered species but also for the people who depend upon the springflows and the water in the Edwards Aquifer.

Where Are We Now?

Edwards Aquifer levels and Comal Springflows are lower now than they were at this time in 1994. The Comal Springs are as low today as they were last July. Despite October 1994 being the second wettest month on record in San Antonio, 1994 recharge was only 538,000 acre feet, far below average. Unless we have good rains this spring, the risks of takes, and even jeopardy, this summer appear to be substantial.

Incidental Take Permit Application

An incidental take permit allows pumping, that causes some takes of individual members of an endangered species, in return for adequate assurances against jeopardy. In other words, it allows more pumping in return for assurances that pumping will not cause the extinction of the endangered species. As this Court previously found, protecting those same minimum springflows is also essential to protect the citizens in the area around San Antonio against movement of the bad water line, which would poison their Edwards water supply, and also to protect the people of San Marcos and New Braunfels and downstream.

To receive an incidental take permit, San Antonio must prove that there are adequate alternative water supplies, an adequate permanent pumping regulation plan, and an adequate emergency withdrawal regulation plan.

Please Develop Alternative Water Supplies

By all accounts, the Monitor and the Monitor's panel are making substantial progress toward agreement upon the alternative water supply component of an incidental take permit application.

The Court commends the Monitor, the City of San Antonio, the San Antonio Water System (SAWS), the Guadalupe-Blanco River Authority (GBRA), the San Antonio River Authority (SARA), the Cities of New Braunfels and San Marcos and others, in particular the Lower Colorado River Authority (LCRA), who have contributed to this progress. The Court now strongly urges SAWS, GBRA and LCRA to enter into the appropriate written agreement or agreements by March 31, 1995 to actually get a minimum of 150,000 acre-feet per year of treated water from other sources flowing in Bexar County at the earliest practicable date. The Court will direct the Monitor to report by March 31, 1995 on such agreement or agreements and, to the extent necessary, on any obstacles to SAWS, GBRA or LCRA reaching such agreement or agreements.

No State Plan In Effect

An incidental take permit application also requires an adequate long-term pumping regulation plan. This Court pointed out in its Judgment, two years ago, and again in its order appointing the Monitor, one year ago, that Texas has no plan in place to regulate Edwards pumping. Almost everyone agrees this is essential, but today there remains no adequate state

pumping regulation plan in place. Indeed, there is no active state effort currently under way to prepare a plan. The Court has difficulty finding words to express its frustration with the lack of progress on this essential step.

Past Plans and Proposed Plan

The State had hoped to prepare an adequate state plan through the Edwards Aquifer Authority, created pursuant to SB 1477, adopted at the end of the 1993 Regular Session of the Texas Legislature. A Voting Rights Act challenge has put SB 1477 and the EAA in limbo for nearly two years now. To overcome these problems, the State is presently pursuing three approaches: (1) litigation of the Justice Department's Voting Rights Act refusal to preclear SB 1477; (2) amendment of SB 1477 to cure Voting Rights Act obstacles; and (3) settlement discussions. Summary judgment in favor of the State has been denied and the matter set for trial in April. An amendment (S.B. 418) to change S.B. 1477 in hopes of curing the Voting Rights Act problem has passed the Texas Senate 27-3 and action is expected soon in the Texas House of Representatives. But, as in 1993, there is debate over whether the cure will pass muster with the U.S. Department of Justice. There has been no public report whether the legislative leadership has shown the curative legislation to the U.S. Department of Justice and received such assurances. Under the circumstances, no one can say whether the State of Texas will in the next three months even begin active work to prepare an adequate state plan through the EAA. Moreover, it is apparently undisputed that the EAA will have no funding under proposed curative legislation thus far filed. How the EAA can prepare and enforce a plan without funding and staff has not been explained. Clearly the State will not have an adequate plan in place by this summer.

An Observation Re: The Interlocal Agreement

In this connection, the Court notes that three districts, the Edwards Underground Water District, the Medina County Underground Water Conservation District and the Uvalde County Underground Water Conservation District have entered into an Interlocal Agreement. The three districts tout this agreement as providing for adequate state regulation of the Edwards. (Luana Buckner, General Manager of the Medina District, says it "will provide effective management of the Edwards Aquifer." 1/4/95 letter to State Sen. Bill Sims.) The Agreement does recognize as a goal "to maintain springflows at levels necessary to comply with the Endangered Species Act (as hereinafter defined)," 1.1.3, p. 1. On its face, however, the Interlocal Agreement is inadequate for that purpose. All control will remain with each district (3.1) and no incentive is contemplated to reduce usage below historic high levels in Medina and Uvalde Counties (4.2.3) or to obtain additional water resources except to meet needs above total regional high demands. (4.9). The Agreement contains no provision for long-term regulation to reduce pumping below historic high levels down to safe yield levels in a repeat of the drought of record. It contemplates "conservation plans" that do not meet ESA requirements. (5.6). Finally, no outside party, except one of the three districts, is able to file suit under the Agreement to enforce it. (8, p. 10).

The Interlocal Agreement does not solve the very real problems of the Edwards. Rather, the Agreement may just be a way to pretend to do something--in order to make others less likely to actually do something constructive. The Interlocal Agreement appears to this Court to be of no value for a long term or even a short term solution to the problem.

Springflow Augmentation - No es bueno

Also in this connection, the Court wishes to express extreme frustration with the continuing waste of time and money on springflow augmentation "studies." The Court thought it made it clear in its Amended Findings and Conclusions that Aquifer levels should never again be allowed to drop below the levels needed to provide adequate natural springflows. This is necessary to protect both endangered species and human water quality.

The U.S. Fish & Wildlife on January 25, 1995 once again firmly rejected as biologically infeasible the McKinney/Sharp springflow augmentation theories. The subsequent McKinney/Sharp "final" report does not directly address the USFWS' specific comments, but does concede that its biological feasibility is "uncertain."

Springflow augmentation "studies" also do not appear to be a good-faith effort to do anything, much less to solve the very real problem of the Edwards. Rather, these "studies" also appear to be a way to pretend to do something--in order to make others less likely to actually do something constructive.

The Court strongly urges anyone that has anything to do with any ongoing "study" of whether the Aquifer, or any part of the Aquifer, can be drawn down below the minimum levels needed to provide adequate natural springflows to stop wasting time and money. Instead, spend your time and money wisely, on the two real solutions to this crisis: (1) regulating pumping to avoid violations of federal law and an environmental and water quality catastrophe; and (2) bringing in substantial alternative water supplies to avoid an economic catastrophe.

Preparing an Emergency Withdrawal Reduction Plan

In the absence of substantial alternative water supplies actually flowing, and of an adequate permanent state plan that can be timely implemented, an emergency withdrawal reduction measures must be ready this summer. This requires consideration of three issues: (1) the substance of such a plan; (2) the legal authority and institutional means for implementing it, if necessary; and (3) an opportunity for those who oppose the plan to present evidence on disputable facts relevant to the plan. All of this needs to be done quickly and in any event well before June 1995.

The Substance of the Emergency Withdrawal Reduction Plan

The Monitor has previously prepared a report on an Emergency Withdrawal Reduction Plan (August 1, 1994). That report leaves to be determined the identification of specific categories of discretionary uses which should be curtailed first in an emergency.

The Monitor can reasonably be expected by March 31, 1995, to prepare a revised plan addressing a trigger level and the order of curtailment.

Legal Authority and Implementation Mechanism

Reluctantly, the Court could find, as the Texas Water Commission did in 1992, that the Edwards has all the essential characteristics of a watercourse on the surface of the earth, that its waters are therefore owned by the State of Texas, and that the TNRCC (successor to the TWC), a party to this case from the beginning, may properly be ordered to implement and enforce the emergency withdrawal reduction plan. Based on the Amended Findings and Conclusions and the extensive factual record in this case, the Court concludes today that there is a very high likelihood of success on the merits of the state-ownership claim. Assuming the water is state-

owned, the Court can order the TNRCC to regulate pumping because it would be guilty of unlawful takes under the Endangered Species Act if it fails to adequately restrict use of state property by others. The TNRCC may also be guilty of violations of various federal water quality laws because of contamination of the fresh water in the Edwards caused by excessive pumping of the state-owned water. Accordingly, the Court is presently inclined to believe that this is the most logical and effective alternative, as well as the alternative with the greatest procedural protections against arbitrary or ill-considered action. The Court strongly encourages the TNRCC to begin contingency planning now, so that it will be ready by May to implement the Monitor's emergency withdrawal reduction plan if so ordered.

Furthermore, the Court has before it the largest pumper, San Antonio, and representatives of other large categories of pumpers, irrigators McFadin et al., and may properly order them to reduce their pumping in the event of an emergency.

The Court will invite all parties to file briefs by March 15, 1995 concerning the Court's authority to order the Monitor's emergency withdrawal reduction plan to be implemented through each of the foregoing alternatives.

The Court believes it has the legal authority to protect the Comal and San Marcos Springs, and thereby the Aquifer and the humans and endangered species dependent upon them, in an emergency such as we may face later this year. The Court will not act if it is clear that the Court lacks any authority. But, if no one else will solve the problems in time, the Court will resolve any close questions or disputes over authority in favor of action, in an effort to prevent irreversible harm, unless and until the Fifth Circuit rules otherwise.

The Court requires that any party who submits that the Court lacks any authority to take emergency withdrawal reduction action this summer, to specify any alternative means by which the Comal Springs will be protected this summer. Any party which takes the position that there is no legal means by which the Court can this summer protect the Springs must say so.

All parties will be permitted one simultaneous reply brief to be filed on or before March 29, 1995.

Factual Disputes

The extent of the hydrological risks will be better known by late April. Good rains may afford another "breather." The parties' briefs may raise other disputed fact issues relevant to the Court's jurisdiction and/or to the justification for emergency relief or to the terms thereof. The Court has repeatedly made it clear that the parties will be afforded an opportunity to present evidence on these issues. A hearing for this purpose will be set for May 19, 1995.

In light of the litigation history of this case, the Court will look with disfavor upon expensive, unnecessary discovery or prolonged trial of these issues. The Court expects opposing counsel to work out these matters with a minimum of court intervention. In the event of disputes, the Court expects to amend the prevailing party or parties' litigation costs.

Roles of the Secretary of the Interior, the U.S. Fish & Wildlife Service and the Secretary of the U.S. Agriculture Department

This Court has previously found that the long-standing failure of the Secretary and USFWS to do their duties under the ESA has allowed this crisis to build, and that a strong federal effort to solve the crises is "long overdue." Regrettably, the Secretary and the USFWS continue to play an essentially passive role, rather than the leading, active planning role

contemplated in the ESA. The Court clearly has authority to order additional relief against the Secretary and the USFWS. They are lead defendants in the existing suit. The relevant facts have already been found against those parties after full trial. Those facts are no longer subject to dispute or appeal by the Secretary of the Interior and the U.S. Fish & Wildlife Service. Among those findings was the finding that they had "failed to take timely action to implement key steps in the San Marcos Recovery Plan, critical to the survival of the species, including: . . . vigorously pursu[ing] a systematic procedure of consultation" with other federal agencies. Finding 167. The Court further found that this failure "eviscerates the recovery planning provisions of the ESA and amounts to an abdication of the Federal Defendants' statutory responsibility to plan for the survival and recovery, not the extinction, of endangered and threatened species." Finding 168. The Court will order the Secretary and the USFWS to report by April 3, 1995, in detail, on the status of their arrangements for consultations concerning the many federal agencies' activities authorizing, funding or carrying out actions likely to jeopardize the species in question or to destroy or adversely modify their designated critical habitat.

The Court will specifically direct the Secretary and the USFWS to report, in detail, on United States Department of Agriculture activities that directly or indirectly authorize, fund or carry out Edwards pumping in, separately, each of Uvalde, Medina, Bexar, Hays and Comal Counties: number of pumpers, number of irrigated acres and dollar amounts of crop subsidies, drought, hail or other agricultural relief payments, etc. In other words, to report on the extent to which federal taxpayer dollars are subsidizing the pumping that causes this crisis.

The Court will also order the Secretary and USFWS to report by April 3, 1995 on the status of their actions determining whether to list as endangered or threatened (and whether and

how to designate habitat for) each Edwards and Comal Springs species for which a petition has been filed. "Status" includes the date by which action on the proposed listing will be taken, and in the case of any species for which the date is later than May 30, 1995, a detailed explanation for the continuing delay.

Finally, the Court will order the Secretary and USFWS to report by April 3, 1995 on how its August 1, 1994 proposed revised recovery plan will solve a crisis this summer and, if that plan will not solve a crisis this summer, what, if anything, the Secretary and USFWS propose to do about such a crisis. If the plan of the Secretary and USFWS is, as it presently appears to be, to sit by once more and watch the springs dry up, the Court would appreciate a candid statement by the Secretary and USFWS to that effect.

The Court wishes to make it clear that the Court is not, at this time, ordering the United States Department of Agriculture, which is not a party, to consult with USFWS or, indeed, to do anything. The Court is only ordering the Secretary of the Interior and the USFWS to attempt to contact the U.S. Department of Agriculture, and to report on the results of such contacts. The Court assumes that the Secretary of Agriculture will return calls and answer letters from the Secretary of the Interior. If this assumption proves incorrect, the Secretary of the Interior may discharge his duty by reporting his efforts to contact Agriculture and Agriculture's failure or refusal to respond.

Accordingly, it is hereby **ORDERED**:

- (1) the Monitor is directed to prepare by March 31, 1995, an updated and revised emergency withdrawal reduction plan, including a specific enforceable concept of discretionary use and proposed irrigation use trigger level(s);

(2) the San Antonio Water Systems (SAWS), the Guadalupe-Blanco River Authority (GBRA) and the Lower Colorado River Authority (LCRA) are strongly urged to enter into the appropriate written agreement or agreements by March 31, 1995 to actually get at least 150,000 acre-feet per year of treated water from other sources flowing in Bexar County at the earliest practicable date;

(3) the Monitor is directed to report by March 31, 1995 on such agreement or agreements and, to the extent necessary, on obstacles to any of the three parties reaching such agreement or agreements;

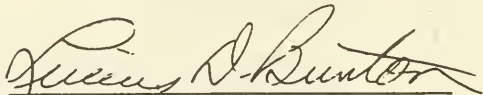
(4) the USFWS shall report by April 3, 1995 on the matters described above;

(5) all parties are directed to submit briefs on or before March 15, 1995 concerning the Court's authority to order implementation this summer, if hydrologically appropriate, of the Monitor's revised emergency withdrawal reduction plan;

(6) all parties are authorized to submit reply briefs on or before March 29, 1995; and

(7) an evidentiary hearing on implementation of the Monitor's emergency withdrawal reduction plan as additional relief in this suit will be held on May 19, 1995.

SIGNED this Sixth day of March, 1995.


HONORABLE LUCIUS D. BUNTON III
SENIOR DISTRICT JUDGE

**SUMMARY OF PROPOSED FARM BUREAU AMENDMENTS
TO THE ENDANGERED SPECIES ACT**

Farm Bureau believes that the Endangered Species Act needs to be amended to provide positive incentives. Farm Bureau has identified several amendments to the Endangered Species Act that are needed:

These amendments include:

-- Compensating landowners for diminution in value of private property. This would track the Takings bill currently in Congress.

-- Providing that ESA actions must only be undertaken after a determination that the benefits of the action outweigh the costs to the community, and further prohibiting any ESA action from imposing an unfunded mandate on state or local governments.

-- Aggressive promotion of the Critical Habitat Reserve Program as set forth in our policy. This provides incentives for private landowners to manage listed species on a voluntary basis.

-- Requiring FWS to include a draft management plan at the time of any listing proposal that considers economics and other factors.

-- Requiring that ESA determinations be supported by credible, verifiable scientific evidence, and that listings and other agency actions be subject to scientific peer review.

-- Clarify that under the citizen suit provisions that individuals whose socio-economic interests are injured by an ESA action have the same standing to challenge that action as do environmental groups. This would clarify that actions can be challenged that go too far to the same extent that environmentalists challenge actions they think do not go far enough.

-- Prohibit citizen suits against private persons, such as individual landowners. Limit such suits to only against the federal government.

-- Amend the section 7 consultation requirements to allow private permit or license applicants to participate in the consultation, provide a maximum time limit for completion of the consultation, provide that participants in an approved habitat conservation plan or in our proposed critical habitat reserve program will not be required to undergo consultation for activities approved under those programs.

-- Provide categorical exclusions or exemptions from section 7 consultation and possibly from section 9 takings liability for activities that will have minimal or no adverse impacts on listed species.

-- Eliminate listing based on subspecies or distinct populations--an exception might be made if listing the subspecies or distinct population is necessary to save the species as a whole.

-- Prohibit listing "isolated populations" of species that are plentiful in other areas of the country or world. Also prohibit listings where more than 75% of the species is outside the U.S.

-- Currently the same prohibitions applied to endangered species also apply to threatened species unless the FWS specifies otherwise. The Act should be amended to either set forth a different set of prohibitions for threatened species, or state that no prohibitions apply unless set forth by rule.

--Remove habitat modification from the definition of "take."
(Unless Sweet Home has already done this.)

AFBF ANALYSIS AND PROPOSED AMENDMENTS TO THE ENDANGERED SPECIES ACT

The purpose of this document is to identify provisions of the Endangered Species Act that have caused problems for agriculture, and to suggest how those sections could be amended to remove those problems.

GENERAL AMENDMENTS

The ESA should be amended to specifically include the compensation requirements when private property is diminished in value, risk/benefit criteria, the unfunded mandates requirements, and any other regulatory reform measure passed by Congress. Even though these elements might be in general legislation applicable to the ESA, it would be advantageous to incorporate that same language into the ESA.

The regulatory reform legislation is needed because of documented abuses in the regulatory process. Many of these stories concern administration of the Endangered Species Act. Even if such legislation were not being considered concurrently in Congress, the principles of such bills would be necessary elements of ESA reauthorization.

The American Farm Bureau Federation sees enactment of these principles as going a long way toward solving many of the problems that our members have with the Act. Enactment of these amendments is a priority for the American Farm Bureau Federation the reauthorization of the Endangered Species Act.

SECTION TWO. CONGRESSIONAL FINDINGS AND PURPOSES OF THE ACT. 16 U.S.C. 1531.

The findings and purposes of the Act are stated in such a way that they are often cited for the proposition that it was Congressional intent that conservation of troubled species should have the highest priority. In addition, the statement in subsection (b) concerning preservation of "the ecosystems upon which endangered and threatened species depend" has bolstered the proposition that "habitat preservation" is a prime goal of the Act and has also given rise to the biodiversity concept within the Act.

Even though this section has no substantive requirements as contained elsewhere in the Act, this section sets the tone for the Act and is often cited as evidence of Congressional intent.

Suggested Amendments: In section (a)(1), add a statement that recognizes extinction by natural processes. In subsection (b) ("Purposes"), add notions of consideration of economic, social, environmental and technological factors to balance species conservation. In subsection (c)(a), add the idea that such species conservation shall be done in accordance with the purposes of this chapter.

SECTION THREE. DEFINITIONS 16 U.S.C. 1532

The expansive definitions given to many terms in the Act have provided overzealous bureaucracy

with the justification to use the Act for purposes for which it was not intended. The definitions in this section should be carefully reviewed and limited so they cannot be expanded to justify activities outside the purposes of the Act. In this respect, some definitions will have to be amended, while others should be added.

Critical Habitat -- It is currently defined to include areas outside currently occupied habitat. This allows for protection of habitat by the FWS without even a showing that the species is present there. Critical habitat should be limited to only that habitat currently occupied by the species. (Any expansion of habitat should be by voluntary incentive program as set forth below.)

The definition of "critical habitat" should also reflect that it is determined on the basis of credible scientific evidence. **Species** -- It currently "includes any subspecies of or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature." This definition greatly expands the scope of possible listings, and allows for listings without regard to the overall status of a species. Thus, a species that is rare in one area can be listed, even though it is plentiful in other areas and in no danger of becoming extinct (e.g. gray wolf).

This definition must be changed, perhaps to include a scientific definition that incorporates interbreeding capabilities and/or acceptable levels of scientific genetic distinction. The definition should specifically exclude hybrids as protected species.

Ideally, the subspecies and distinct population concepts should be eliminated from the definition of "species." There may be circumstances, however, when listing such species might be warranted. These circumstances should be limited by statute to only those where: (1) the subspecies or distinct population is so distinct from the species that it no longer can interbreed, (2) it has become genetically distinct from other members of the species, or (3) its listing is determined by credible scientific evidence to be necessary for the survival of the species as a whole.

Endangered Species and Threatened Species -- Current definitions provide for listing if threatened with extinction/endangerment "throughout all or a significant portion of its range." This terminology is ambiguous, because it is unclear whether range refers to "current" range or "historical" range (where the species once existed). "Significant" is a term whose meaning has been stretched. We suggest elimination of this phrase. It serves no purpose, and re-focuses the intent of the Act on the actual status of the species as a whole.

Take -- The definition of "take" should be tightened to include only any act that "directly" impacts the species. The terms "harm" and "harass" should be separately defined in the statute to include only direct impacts and to exclude habitat modification.

The definition should also be amended as follows: "Take shall not include any act or omission committed in self-defense or in defense of others or in defense of one's own property."

The Act should include separate definitions for "take" of endangered and threatened species, with lesser restrictions in the take of threatened species.

Isolated Population -- This is a new concept that is a corollary to the "distinct population segment"

idea. An "isolated population" would be defined as "a population of a species, which although few in number in a particular habitat, is of a species that is not otherwise endangered or threatened throughout the United States, Mexico and Canada." Such populations would not be eligible for listing.

This gets to the issue of species that might be low in numbers in the U.S. but which might be plentiful elsewhere in the world. Canada and Mexico were singled out because (1) species in Mexico and Canada are more apt to be extensions of U.S. populations, and (2) Mexico and Canada are more likely to cooperate in conservation efforts if a species is in danger. There are several species that are listed in the U.S. but which are plentiful in Mexico and/or Canada (e.g., gray wolf). Under this concept, they would not be listed.

SECTION FOUR. DETERMINATION OF ENDANGERED AND THREATENED SPECIES. 16 U.S.C. 1533

This section contains procedures and requirements for listing species, de-listing species, and designating critical habitat.

1. Listing of Species

The evidence clearly shows that the current provision is not working and needs to be changed. As currently defined, anybody can propose a species for listing, and species can be listed with little or no supporting scientific data. The government does little independent investigation of the status of proposed species.

This loose procedure leads to many species being listed that are neither threatened or endangered. The current procedure, with no required scientific baselines, deters investigation of a species beyond its immediately defined area. Similarly, listing a species, thereby invoking the restrictions of sections 7 and 9, stifles development of a management plan for the listed species. Because the Act forbids the consideration of economic and social impacts in the listing determination, and because the section 7 and 9 prohibitions stifle development of management strategies, the impacts of listing on agriculture and other affected industries can be devastating.

The procedure and requirements for listing a species needs a complete overhaul. The new section should contain the following elements:

a) Require the submission of a draft species management plan with every proposed listing. The management plan would consider economic, social, and other community factors in deciding how to manage the listed species. This procedure keeps economics, et al. out of the listing process (as it should be) but gives consideration to these factors at the time a listing is made. The Act should also require an affirmative finding, supported by credible and verifiable scientific evidence, that listing a species and resultant management plan will benefit the species. Such a measure also helps the species by providing an active management plan for that species.

b) Require that listing determination must be made "on the basis of competent and credible verifiable scientific evidence necessary and sufficient to support that determination," or words to that

effect. This creates a scientific standard for making ESA decisions that holds the government to a specific burden of proof. The current standard of "best scientific and commercial data available" is no standard at all.

c) Provide for three-person Peer Review Panels to review all proposed listings for sufficiency of scientific information. The same panel would also review the proposed final rule to see if there is sufficient credible scientific information to justify the listing. Panels should be: randomly selected from impartial scientists for each rule, and specifically exempt from the Federal Advisory Committee Act (FACA). Panel findings would be part of both the proposed rule and the final rule, with the Secretary responding to points raised in the panel report.

(d) Prohibit the listing of "isolated populations," and any species where more than 75% of the range or population is outside the United States.

(e) Require at least one public hearing in the area where the species proposed for listing occurs. If the species occurs in more than one state, a hearing should be held in each affected state.

2. Critical Habitat Designation

An integral component of the Congressional scheme for protecting listed species is the designation of critical habitat. The concept is based on a determination of the amount of habitat necessary for a species to survive, and designation takes economic and social factors into account (one of the two places in the Act where economic factors are specifically considered). Designation of critical habitat forces the government, in at least a limited way, to balance the needs of the species with human needs.

While the Act states that critical habitat "shall" be designated, it allows the Secretary to make certain exceptions. These "exceptions" have been abused to the point where critical habitat has only been designated in 16% of the cases.

Section 4 of the Act must be amended by:

a) removing most of the exceptions for designating critical habitat, so that the only exception is if designation would result in the extinction of the species.

b) The "economic impact" of designation is interpreted by the government to mean the impacts over and above listing, which creates a false statement of such impacts. The Act should be amended to specify that cumulative economic impacts should be analyzed and considered in the designation process.

c) Designation of private property as critical habitat should trigger either voluntary participation of the landowner in a Critical Habitat Reserve Program, or compensation for taking of private property. Both of these are described below.

3. De-Listing Process

While the Act briefly mentions that the procedure for consideration of de-listing petitions is the same as for listing petitions, the de-listing part of this provision should be spelled out in more detail.

In addition, the Act should be amended to provide that the government shall de-list species when population goals set forth in the recovery plan have been met. Such goals have been met in many cases, but species are not removed from the list.

In addition, many species are added to the list and nothing is ever done to put that species on the road to recovery. Hopefully, the addition of a draft and final management plan as a condition of listing will prevent such species from falling through the regulatory cracks. However, a provision should be added to the ESA to the effect that if no affirmative federal action is undertaken to implement the species management plan and recovery plan within five years, then the species should be de-listed. The five year period coincides with the review cycle mandated in the Act.

Similarly, if a species has not been sighted for five years, then it also should be either considered extinct or de-listed.

4. Equal Opportunity for Judicial Review

Section 4(b)(3)(C) of the Act provides for judicial review of any negative finding on a petition to list or de-list any species, but no right of review if the government determines that species should be listed or de-listed. The Act should be amended to allow for judicial review of any finding of the government upon a petition to either list or de-list.

5. Recovery Plans

The Act should be amended to provide that recovery plans should be developed in conjunction with approved management plans and critical habitat designations. Recovery goals should reflect the intent of the ESA and be set at levels where species are no longer endangered or threatened with extinction.

If the FWS determines that recovery plans are appropriate for the species, then these recovery plans should be required to be in place no later than one year after listing.

SECTION FIVE. LAND ACQUISITION 16 U.S.C. 1534

This section should be amended to include a provision requiring compensation for diminution in value of private property as a result of ESA actions. This amendment should be reflected in adding this concept to the title of the section.

It appears to be the original intent of Congress in enacting this section that lands required for habitat for listed species should be purchased by the federal government and managed by them. This intent should be reiterated and more clearly stated in the amendments to the Act.

The Act should add a section to this provision to the effect that whenever any activity taken under the ESA diminishes the value of privately owned property, or results in the loss of use or enjoyment

of any valid use of federal or state lands (e.g., grazing permit), then the government is required to pay compensation to the injured party.

SECTION SIX. COOPERATION WITH STATES. 16 U.S.C. 1536.

This section sets forth the relationship between the federal government and states. It should be expanded to include federal relationships with local governments and willing landowners as well. The Farm Bureau Critical Habitat Reserve Program described in our policy should go in this section. That program is outlined in a separate document.

This section should be further amended to authorize entry into cooperative agreements with states and local governmental agencies to preserve and protect listed species in accordance with the management plans that have been developed as part of the listing process. Any such agreements should be voluntary so as not to impose any unfunded mandates.

To further encourage states and local governments to seek workable solutions to these issues, the federal government should recognize and encourage state and local conservation efforts as an alternative to listing. State and local authority and control over listed species should be recognized and expanded, and federally funded accordingly. State and/or local management is more likely to reach solutions that accommodate the needs of both the species and the community. Not only does this preserve federal-state relationships, but also results in more attention provided to the species and its conservation. The provision that allows states to take more restrictive measures to protect endangered or threatened species than the federal government should be eliminated.

A very important amendment is the addition of the arm Bureau Critical Habitat Reserve Program, which provides incentives to private landowners to protect listed species on their property instead of penalties if they do not. It should be a voluntary program that provides for active management of listed species on private property. Such a program will do more to save listed species than any other provision in the ESA.

SECTION SEVEN. INTERAGENCY COOPERATION. 16 U.S.C. 1536

Section 7 of the ESA contains provisions relating to how federal agencies proceed under the ESA. These include requirements for pre-project consultation with the FWS or NMFS, and obtaining exemptions from the requirements of the ESA.

(a) Consultation

Section 7 of the ESA has two separate and distinct provisions relating to how federal agencies must proceed under the ESA. The best known provision is the requirement that for any action "authorized, funded or carried out" by any federal agency, it must consult with either FWS or NMFS, as appropriate, to ensure that the proposed action "is not likely to jeopardize the continued existence of" the listed species. It involves, in some cases, the preparation of a "biological assessment" by the action agency, and a "biological opinion" by FWS or NMFS regarding the impacts of the project on the listed species, as well as possible "reasonable and prudent alternatives" that might be employed to remove any jeopardy findings. Consultations can be formal or informal.

The consultation process should be amended as follows:

(1) Allow a private permit or applicant for a license to participate in the consultation with the action agency and FWS.

(2) Provide a maximum time limit for completion of consultation that is reasonable.

(3) Recognize that activities that are taken in conformance with approved Habitat Conservation Plans (HCP) and final management plans as provided in these amendments shall not require section 7 consultation. A finding of conformance with either the HCP or management plan would be sufficient.

(4) Require within the context of species management plans that activities be delineate which will have minimal or no adverse impacts on listed species. Such activities would be categorically excluded from section 7 consultation requirements and from section 9 take provisions.

(5) Where a jeopardy opinion results in a conflict between the ESA and the agency's responsibilities and duties under applicable statutes and regulations, then the President should resolve the conflict.

(b) Conservation

The second provision provides for federal agencies to "use their authorities in furtherance of the purposes of this chapter by carrying out programs for e conservation of endangered species and threatened species ..." (Section 7(a)(1))

Certain interests are pushing for an interpretation of this clause that would require agencies to initiate programs and projects to enhance endangered or threatened species populations above and beyond the requirements of the ESA. In other words, these interests are pushing for an affirmative duty on federal agencies to make ESA considerations the primary mission of the agency over all other interests.

Section 7(a)(1) might be amended to state that federal agencies shall cooperate with the Secretary in the administration of the ESA. We believe that is the intent of the section. Otherwise, this section should be deleted.

(c) Endangered Species Committee

The process devised in 1978 to resolve the snail darter conflict has proven unworkable in actual practice. The Committee has only been convened twice since the snail darter situation.

The ESA should be amended to present a more streamlined approach to resolving federal conflicts and to provide for exemptions. In addition, any such process should involve the governors of the affected states as members of any decision-making body.

SECTION EIGHT. INTERNATIONAL COOPERATION 16 U.S.C. 1537

This section relates to the cooperation between the United States and foreign countries with regard to protection of endangered and threatened species. It does not directly affect U.S. agriculture, except that it provides an authority for entering international compacts such as the Biological Diversity Treaty.

SECTION NINE. PROHIBITED ACTS. 16 U.S.C. 1538

This section includes the prohibition against "taking" listed species. We would re-define "take" to include only direct impacts on species, and exclude indirect impacts such as habitat modification. The definition would also exclude any activity taken in self-defense, or in defense of others or property. This section can clarify that any action taken to repair or maintain an existing facility, structure or piece of ground shall not constitute a "take" under the ESA.

As subsection (a)(1) only applies to endangered animals, there should be a second corresponding section that pertain to threatened animals. It should put the burden on the government to affirmatively develop special rules for each threatened species, subject to notice and comment. The section should provide that these special rules shall constitute the only restrictions resulting from threatened species. In other words, if not specially promulgated, there are no restrictions.

The prohibitions applied only to threatened species would be less stringent than those applied to endangered animals. For example, the 5 acre or less exclusion proposed by Secretary Babbitt is a good example of this, and might be a good starting point for amendment.

The section should also be amended by adding the following:

"Any activity or omission of a non-federal entity is deemed not to constitute a take of a species under this section if the activity or omission

(a) was authorized as part of an approved Habitat Conservation Plan, and/or an incidental take permit issued in conjunction therewith,

(b) is authorized pursuant to participation in the Critical Habitat Reserve Program,

(c) the activity underwent consultation pursuant to section 7 of the Act and either no jeopardy was found or the activity is a reasonable and prudent alternative as provided in the biological opinion."

SECTION TEN. EXCEPTIONS. 16 U.S.C. 1539

This section deals with incidental take permits, habitat conservation plans and experimental populations. In all three cases, amendments will improve administration of the Act and impacts on agriculture.

(a) Incidental Take Permits

The FWS and NMFS have proposed the addition of certain new chapters to their respective

agency manuals that increase the flexibility of incidental take permits and habitat conservation plans. Many of these additions have some merit and should be codified.

For example, the proposal sets outer limits for the approval of incidental take permit applications. Since many such applications have languished within the agency for years, such an amendment would be beneficial.

The proposal also provides for different levels of incidental take permit applications depending on the intensity of the impacts that the applicant will have on listed species. This distinction thus separates the interests of the big developers or the county from the small producers who want to take advantage of the process as well. A statutory amendment incorporating these levels of permits will help in this regard.

The key issue is flexibility. The statute needs to adapt to greater or lesser impacts, to whether species of interest are listed as endangered or threatened, and even to levels of how endangered some species might be.

(b) Habitat Conservation Plans

These are the main components of applications for incidental take permits. Many of the same amendments described above apply to Habitat Conservation Plans as well. It should be made clear in this section that activities authorized pursuant to an approved HCP will not be considered as a "taking" and will not be subject to consultation under section 7.

Habitat Conservation Plan requirements must be made less burdensome and more flexible.

(c) Experimental Populations

The statute must be amended to clearly provide

(1) There is a distinction between reintroduction of a species and augmentation of existing species by bringing in other members of the same species from other areas to an existing population. Both situations should be defined in the section, and both should be subject to the same restrictions.

(2) Populations can only be introduced into areas of known historic range of the species, based on accepted scientific evidence. Different subspecies cannot be put into areas where that subspecies did not once exist.

(3) No reintroduction can occur where any members of a naturally occurring species might overlap with any members of the experimental population. For purposes of this section, no augmentation of species by bringing in other members of the same species is allowed, unless the Secretary determines on the basis of sound, credible, verifiable scientific evidence that such augmentation is necessary to save the species from extinction.

(4) No species can be reintroduced or augmented without a designation as an "experimental population."

(5) The special consultation rules of 50 CFR 17.81 should be codified. These rules require the FWS to specially consult with state and local governments and affected landowners, and to reach agreement to the maximum extent practicable.

(6) The law should provide that no reintroduction or augmentation shall occur without the express approval of the affected state or states. That could mean approval by the governor or the legislature, if that is the mechanism provided by state law.

(7) The law should provide that the federal government is liable for any damages, losses to property or diminution on property value resulting from any reintroduced or augmented species and its progeny. In this respect, this section will supercede the provisions of any independent takings legislation passed by Congress.

(8) The law should be amended to provide that any proposed reintroduction or augmentation is subject to NEPA, and further that it shall be subject to the same notice and comment provisions as for listings, etc. The provision should also be amended to require at least one public hearing in each affected area.

SECTION ELEVEN. PENALTIES AND ENFORCEMENT. 16 U.S.C. 1540

The primary focus in this section is on the citizen suit provision, 16 U.S.C. 1540(g). This section should be amended by:

(1) Adding a subsection 1(D) that specifies that a citizen suit may be brought to challenge any action taken under the ESA, as provided in subsections (A),(B), and (C), above) to protect economic, social, biological or environmental interests. This is necessary because some courts are denying standing to plaintiffs alleging economic injury.

(2) Delete "any person, including" from section 1(A). This eliminates suits against private citizens. An alternative is to require plaintiffs suing private defendants to post a bond equal to the entire value of the property at issue, but that would be a back-up position.

The U.S. Congress is urged to take the following actions:

**REINVENTING GOVERNMENT
- THE RIGHT WAY**

A bipartisan effort in the public interest

- Ecologically sound
- Economically sound
- Constitutionally correct

to conserve and improve the renewable natural resources on which we all depend while producing from them and increasing revenue versus preserving them without production at taxpayer expense.

USDA Reorganization

- Appoint to policy positions at all levels experienced professional resource managers who must be familiar with resource needs and requirements to meet them.
- Stop attempts by USDA officials to combine, consolidate or otherwise link in any way the Natural Resource Conservation Service and the US Forest Service at any and all organizational levels.
- Review the changes made in P.L. 103-354 to determine if the act is consistent with the desired reinvention. For example, section 213 of the act defines "field structure" as all offices outside the District of Columbia.
- Request a complete economic analysis of the actions contemplated or already taken in the current reinvention plan.
- Transfer state and private forestry functions and programs of USFS to NRCS to provide coordinated assistance by one agency on private lands with clear line of responsibility of USFS only on the National Forest System and National Grasslands. Redesignate USDA delivery responsibility for Coastal Zone Management to NRCS.
- Enact the Grazing Lands Conservation Initiative (GLCI) to provide line item funding for voluntary technical assistance only by grazing lands trained personnel of NRCS to serve half the nation now receiving only 2% of assistance.

- Simultaneously rescind RCA 1977 and RPA 1974 (except for the timber harvest management provisions). Both have required far more effort, cost, and problems than any value realized.

Clean Water Act

- Designate responsibility for point source activities subject to measurement and regulation to EPA staffed with attorneys and engineers. Direct leadership for guidance and technical assistance for agricultural point source activities (concentrated animal feeding operations) to USDA.
- Designate responsibility for nonpoint source activities to Soil and Water Conservation Districts assisted by NRCS which already have legislated responsibility on state and privately owned land. Nature cannot be regulated (reference Mississippi flood). Natural resource management planning must be site specific from the ground up, not from the top down, and flexible enough to respond to constantly changing conditions.
- Designate responsibility for nonpoint source activities on federal lands to USFS and Bureau of Land Management on lands for which each is responsible.

Endangered Species Act

- List only the species for which the following science-based data have been determined:
 - Historically, how many were there and where were they?
 - How many are there now, and where are they?
 - How many should there be, and where should they be?
 - What will the cost be to establish/reestablish and maintain this number of animals or plants?
 - With this information on which to base a sound decision, determination to list and support shall be made only by an act of the U.S. Congress.
- Delist any previously listed species which have not met the above criteria.
- Create incentives to encourage landowners to maintain or improve habitat management.

- Fully compensate landowners for any restricted use which results in loss of value or productivity related to endangered species compliance.

Wetlands

- All agencies accept correct science-based definition and delineation of wetlands as lands having all three characteristics of hydric soils, predominance of hydrophytic vegetation, and wetland hydrology (ponded water or a saturated soil substrate for much of the growing season).
- Rewrite wetland mapping MOA among agencies to include rangeland and forestland under USDA purview where they belong instead of under Corps of Engineers and EPA without scientific expertise.

Acquisition of Private Lands

- No privately owned land shall be acquired by the U.S. Government by purchase, gift, bequest, or lease except by specific act of the U.S. Congress for that acreage after accurate economic impact on that region and cost:benefit ratio of acquisition and maintenance expense to the public have been determined.

Biodiversity/Ecosystem Management

- Do not ratify the Biodiversity Treaty and stop U.S. funding of it through the United Nations.
- Halt the "Ecosystem Management Plan" and the "Wildlands Project" being advanced by executive action without the consent of Congress. These activities subvert major constitutional protections for American citizens and their property.

Cultural Resources

- Amend the National Historic Preservation Act specifically to recognize the rights of private property owners and return to the states all authority for the preservation of cultural resources not already listed and protected by the federal government as national sites. Any additional listing by the federal government should require the consent and approval of Congress.

ADDITIONAL CONSIDERATIONS FOR FUTURE LEGISLATION:

- o The Act should serve to inform the public about species at risk.
- o The Act should state clearly that it is not intended for land use control.
- o The Act should include cooperation with already existing Federal and State agencies as well as utilizing qualified volunteers from conservation organizations.
- o The Act should rely less on regulation and more on information, education and cooperation.
- o The Act should make it clear to the regulators empowered the need for all to be schooled regularly as to their duties and responsibilities and should emphasize how to meet the public and interpret the regulation to them.

STATEMENT
OF
MAURY HOOD
PRESIDENT, TEXAS CAPITOL AREA
BUILDERS ASSOCIATION
PREPARED FOR THE
ENDANGERED SPECIES TASK FORCE
OF THE
U.S. HOUSE OF REPRESENTATIVES
ON
REAUTHORIZATION OF THE
ENDANGERED SPECIES ACT
MARCH 20, 1995

Good morning. My name is Maury Hood. I am a builder and developer in the Austin, Texas area. I also serve as President of the Texas Capitol Area Builders Association which represents developers and home builders in eight counties around Austin. I am here today as a spokesperson for the numerous landowners, home builders, and home buyers in the Austin area who have confronted problems with the implementation and enforcement of the Endangered Species Act. Most importantly, I am here as someone who has personally experienced the impacts of the Endangered Species Act. My testimony today has three goals. First, I will describe how the Endangered Species Act (ESA) has adversely impacted the Austin area. Second, I will share with you how the ESA almost caused my personal bankruptcy. Third, I will suggest the reforms, that according to builders' experiences, are necessary to make the Act equitable and efficient.

The Endangered Species Act imposes some of the most stringent restrictions on the use of private property of any federal statute. The Act's provisions are mandatory, inflexible, and absolute. Unlike most legislative schemes, the statute's commands are not moderated by "where practicable" or "where the benefits exceed the costs." The Act makes it a federal offense for anyone to "take" any species listed as threatened or endangered. The "take" prohibition is broad. It prohibits harassment or "harm" to a listed species, with FWS regulations defining "harm" to include habitat modification. The inclusion of habitat modification under the definition of "take" allows the Act to restrict, if not to prohibit outright, development on vast areas of private and public property. A species' range can encompass millions of acres. The Golden-cheeked warbler, for example, resides in an area stretching from Texas to Guatemala. Thus, the land use restrictions imposed by the Act can easily and dramatically impact local and regional economies.

THE ACT'S IMPLEMENTATION IN AUSTIN

Austin builders are intimately familiar with the Endangered Species Act. Since 1987 the U.S. Fish and Wildlife Service has determined that several species which reside in the Austin area including two birds, the Black-capped vireo and the Golden-cheeked warbler, and seven cave invertebrates, require the Act's protections. In addition, FWS is currently reviewing a petition to list the Barton Creek salamander as endangered.

As a result, several thousand parcels of land covering approximately 250,000 acres in Travis County alone are regulated by FWS as potential habitat. The Act's prohibitions have empowered the Austin FWS Regional Office to permanently halt or significantly delay numerous private development and public improvement projects in Travis county. I have included several case studies, in addition to my own, with my testimony which substantiate the difficulties builders face to comply with the Act's provisions.

The listing of the Golden-cheeked warbler as an endangered species, for example, effectively imposed a development moratorium in Travis County. The county appraisal district estimated that land values in the area fell from over \$335 million to less than \$57 million after the warbler was listed. Moreover, estimates reflected a reduction in property tax revenues from almost \$7 million to \$302,000. These figures do not include lost revenues from abandoned business ventures, and foregone taxes to the city, school districts, and county government. My own project, Jester Estates, was foreclosed on by the bank as a result of FWS's inability to issue a permit in a timely fashion.

JESTER ESTATES

In March 1990, I began construction on Jester Estates II, a 400 lot residential development. This subdivision had previously been approved for development by the City of Austin. In May 1990, FWS emergency listed the Golden-cheeked Warbler. The Jester development required a utility line across a dry creek which required me to apply for a Section 404 Army Corps of Engineers permit pursuant to the Clean Water Act. As a requirement of that permit process, it was necessary that I obtain a Section 7 permit from FWS pursuant to the ESA. I promptly initiated the Section 7 process, and in October 1990 FWS released 30 lots for development. In December 1990, I met with representatives from the FWS and the Corps to re-initiate the Section 7 consultation process for the remaining 350 lots. FWS requested that I hire a biologist to complete two years of warbler surveys. FWS mandates that the warbler surveys can only be completed between April 1 and May 30. I complied, hiring a biological consultant to complete the surveys at a cost of \$6000. The biologist documented that there were no warblers within 500 feet of the property to be developed. Armed with that information, I made a formal written request to FWS to issue a no jeopardy opinion and release the property. Six months later, in October 1991, I had still not received approval. At that point, I began to meet with the Austin FWS Office on a weekly basis. Finally, on March 2, 1992, FWS released my property for development. Unfortunately, due to the fact that I was receiving no income from the project, I was unable to continue to make my loan payments throughout this protracted process. Consequently, on the same day the FWS gave approval for the process, the bank foreclosed on the subdivision and I lost the property.

As a result, the testimony I offer today is not designed to reiterate private property polemic. Rather it highlights those areas of the Act that desperately need reform and outlines the legislative improvements to eliminate the Act's weaknesses. I want to preserve endangered species. But I also want to see unnecessary bureaucratic regulations that are falsely touted as environmental preservation eliminated. Most frustrating is that the two years I spent waiting for a permit did not save a single warbler.

I believe that species preservation and environmental conservation is a worthy national goal. Most home builders would agree. We understand that Austin's natural environment makes it an attractive and desirable place for many

families to work and reside. However, Congress must ensure that the Act's significant land use prohibitions are exercised only when necessary. Accurate and reliable scientific data should be mandated to demonstrate a species is truly endangered before it is listed. Congress must also guarantee that the Act's sizable costs are distributed equitably.

THE RECENT ADMINISTRATIVE PROPOSALS

Recently, Secretary Babbitt announced a series of administrative policies to improve the Act's implementation. The reforms address several issues: 1) the need to use sound science for ESA decisions; 2) the importance of recovery plans which minimize social and economic impacts; 3) the desire for predictability concerning the how species listings impact proposed or on-going activities; 4) cooperative approaches for species dependant on the same ecosystem; and 5) coordination of state agencies in ESA activities. In addition, the Departments of Interior and Commerce plan to convene an interagency working group to develop additional administrative or regulatory reforms to further improve the ESA's implementation.

Secretary Babbitt's long-awaited administrative proposals are commendable. However, they do not eliminate the need for legislative reform. Regulatory proposals are too often short-lived; secure only during the lifetime of the current administration. During the announcement of the new administrative changes Secretary Babbitt stated, "This Administration is committed to an Endangered Species Act that works ... we must act more effectively." Congress should institutionalize these changes and back them up with the force of law. Secretary Babbitt's proposals make substantial, positive steps in yielding an ESA law with which land owners, environmentalists, and the government can all work together. Secretary Babbitt's actions to improve the Act heightens the growing momentum for reform. His proposals should receive permanence. During reauthorization, the Act should be reformed to reflect these changes.

THE NEED FOR LEGISLATIVE REFORM

Congress' stated goals are unattainable within the present legislative program without significant economic consequences. Few of the thousand-plus species listed as endangered or threatened have been removed due to recovery, indicating that efforts to date have been unsuccessful. A 1990 Inspector General report estimates the recovery costs for presently listed species will exceed \$4.6 billion over the next ten years. Many believe this figure is extremely low, considering that cost estimates for recovering the northern spotted owl range from \$21 billion to \$46 billion. In this deficit-laden age, it is unlikely that FWS's budget will increase to the level the statute demands. In FY 1994, for example, FWS's endangered species recovery budget was just over \$29.5 million. While preservation of every species is a laudable goal, it is simply not a realistic one.

When Congress passed the ESA in 1973, it painted with a broad brush. Instead of playing God, Congress opted to play Noah: all endangered or threatened

species were to be treated without discrimination, and none would be given more favorable treatment than any other. The tiny snail darter deserved no less protection than the regal bald eagle. While admirable, Congress's intentions are scientifically and financially impracticable. Moreover, when FWS spends its own money, the agency shows favoritism. Typically, much more money is allocated to charismatic species. A 1991 FWS study entitled *Federal and State Endangered Species Expenditures* revealed that eight of 247 listed animals received half of the total funds devoted to species protection. Those disproportionately favored include the Florida panther, the California condor, and the Puerto Rican parrot. For example, wildlife officials spent \$5 million for every panther beyond the initial population at the time of listing. Conversely, three-quarters of the animals shared a paltry 10-percent of all expenditures. Although FWS's official stance is that all species are created equally, its funding activities manifest otherwise. Congress must recognize that, whether the Act condones such decisions or not, FWS must make choices as to which species to preserve and which to overlook. The choices, while difficult, are clear: either Congress makes the necessary fiscal trade-offs to provide ample funds for the Act's administration, or Congress devises fundamental changes to the legislative program. Reform legislation is crucial to balance worthy aspirations of species preservation with realistic budgetary constraints.

During Congress' ongoing debate over the Act's reauthorization, environmental organizations assert that the ESA should be reauthorized without significant legislative changes. Many environmental organizations assert that the ESA's protections should be extended to species before their existence is threatened. Yet prior to the reauthorization debate the ESA has not been without its environmental critics. Peter A.A. Berle, President of the National Audubon Society, acknowledged publicly that "the Act is not working well enough to accomplish its purpose." One of the Act's drafters and a former Sierra Club president, Douglas Wheeler, was succinct in his criticism: "The Endangered Species Act just doesn't work." His sentiments reflect the exasperation felt in both the industry and the environmental community. Consequently, before Congress considers broadening the scope of the Act, the statute's legislative scheme should be made more efficient and equitable. Accordingly, the Act must be reformed in five areas: the listing process, critical habitat, habitat conservation plans, federal cost-sharing, and compensation.

THE LISTING PROCESS

First, controversial decisions taint the listing process. The regulated landowner community is skeptical of the species listing process because of the inadequate scientific grounds for many listings and inadequate compliance guidance provided in most listing rules. Currently, there is no congressional direction to guide FWS in their listing decisions. Accordingly, the agency routinely renders unreliable listing decisions with no basis in science or fact. The harmful results from FWS's current listing practices are significant: the agency inevitably

reviews and accepts petitions to list species that do not face danger of extinction. Additionally, the petitioner should, but in practice does not, bear the burden to marshal sufficient evidence and prove the case that a particular species warrants the Act's protections.

The listing of the Golden-cheeked warbler as endangered exemplifies the sparse and questionable data upon which FWS routinely relies. Biologist Warren Pulich, the preeminent scholar on the warbler, raised serious questions regarding the validity of the data on which FWS listed the Golden-cheeked warbler. In a letter to former Interior Secretary Lujan, Dr. Pulich stated that the sole report used to determine the warbler's viability countered "sound ornithological practices." While Dr. Pulich did not oppose the listing of the warbler as endangered, he did state that the petition did not provide sufficient evidence to prove the warbler's status. The Golden-cheeked warbler's listing as endangered also epitomizes the Endangered Species Act's potential to be misused as a no-growth tool. An environmental organization invoked the Act's emergency listing procedures through one sentence, added post-script, to a letter written to Austin's FWS office. According to the letter, an unidentified source close to the environmental group expressed a belief that the warbler's existence was jeopardized based on a single landowner's attempt to clear his property. This was enough to spur FWS into action. The agency listed the warbler and even determined there was an emergency "posing a significant risk to the well-being of the [warbler]." The warbler's listing became effective immediately under the Act's emergency procedures, thus suspending normal rule-making requirements and the opportunity for public comment. FWS justified the listing by announcing that 220 acres of warbler habitat had been cleared.¹ However, the agency selectively neglected to disclose that 105,000 acres of suitable warbler habitat remained in Travis County alone. The warbler is also found in over 41 counties in Texas.² It is highly doubtful that a negligible loss of habitat could constitute an imminent threat warranting the warbler's emergency listing and justify the abandonment of normal rule-making procedure.

Tactics to thwart development in the Austin area through misuse of the listing process do not end with the warbler. A petition to list the Barton Springs Salamander as endangered was submitted to the Austin FWS office. The Barton Springs Salamander is currently considered a Category 2 species under the Act, which means that there is insufficient information, without additional biological and field study, to determine if the species is endangered.³ Independent research, completed by qualified biologists and scientists, analyzed the technical

¹ 55 *Federal Register* 18844.

² *Comprehensive Report of the Biological Team*, Austin Regional Habitat Conservation Plan Biological Advisory Team, January 21, 1990, p. 16-17.

³ 54 *Federal Register* 558.

and biological allegations made in the petition. They discredited the petition in its entirety. These biologists found that statements made in the listing petition are not based on any scientific information whatsoever. Moreover, the petition omitted an extensive body of scientific information which directly contradicts many of the claims made in the petition. Indeed, more of the petition is devoted to identifying and deriding land development activities than to actual biological and other scientific concerns raised by the petition. If FWS were required to adopt a rule or regulation that provides precise listing standards, scarce agency resources would not be squandered reviewing clearly specious petitions. Unfortunately, the salamander remains a potential candidate for listing.

Finally, the Austin FWS office determined that Williamson County's petition to delist the seven Austin cave invertebrates "does not present scientific or commercial information indicating that delisting may be warranted." The delisting petition was based on the indisputable evidence that, while FWS listed the species based on the premise that they exist in only six caves in close proximity, several of the species have been found since then in scores of scattered caves. Contrary to that rather straight forward reasoning, FWS argued that it believes "the recent revitalization of the real estate market in the Austin metropolitan area has maintained *and intensified* the threat of karst invertebrate habitat destruction and other associated threats." Hence, according to the agency, "the expansion of the overall range is not significant." In other words, the purportedly limited range was significant in 1988 as the reason for the listing, but now the much expanded range is not a meaningful factor to consider when reevaluating its endangerment.

Congress must ensure that FWS extends the Act's protections to only those species which are truly threatened or endangered. The listing process should be reformed to require a stricter scientific basis for listing species. Field testing, to verify the data collected for the listing decision, should be required. Congress should also mandate a blind peer review system to review the biological data upon which FWS's listing decision is based. In contrast, Congress should not entertain the suggestion to extend the Act's significant protections to mere candidate species, thereby eliminating any meaningful distinction between candidate species and endangered species. This proposal makes a bad situation worse: it would add species to the endangered list which, according to scientific data are not confronted with imminent extinction. Such revision would wreak havoc on Austin's economy and irreparable harm to the development community here. There are over 300 candidate species in Texas alone awaiting FWS's determination of their status. If these candidate species share the same status as endangered species, Texas's municipalities would be paralyzed. It would be far more productive to utilize federal, state, and local resources to recover species already listed.

Further, Congress should require definitive criteria for determining when development poses such imminent threats to a species' existence that an emergency listing is warranted. If Congress fails to reform the listing process, FWS decisions will continue to erode the credibility of the federal government and

widen the schism between environmental and economic interests.

Congress should be mindful of the cumulative financial impacts of each subsequent listing decision on earlier listing decisions. Every time a species is listed, the total costs of recovery for already listed species necessarily increase. The allocation of federal monies to the preservation of individual species will diminish in rough proportion to the number of species listed as endangered or threatened. Listing more and more species does not ensure greater species protection. In fact, listing too many species may actually reduce the government's ability to protect species. Economic resources are finite. When resources devoted to recovery are spread too thin, insufficient funds remain to achieve recovery of any single species. In 1990, for example, the government spent \$85 million dollars on the preservation of 247 (non-marine or plant) species. If the monies were distributed equally among those 247 species, each species would receive \$344,130 worth of preservation efforts. However, when all of the 3,000 candidate species waiting to be added to the endangered species list finally receive the Act's protections, each will receive less than \$21,000. The Act's chief goal to conserve truly endangered and threatened species, therefore, is beyond financial reach when FWS lists species that are not in danger of extinction.

CRITICAL HABITAT

Second, FWS routinely fails to designate critical habitat for listed species. Congress mandated that the critical habitat of a species should be identified at the time the listing decision is made "to the maximum extent prudent and determinable." Only those areas essential to the protection and recovery of the focal species are considered its critical habitat. Furthermore, section 4 of the Act directs FWS to consider economic and other relevant impacts when it designates critical habitat, and the Secretary may exclude any area from a species' critical habitat if the detriments of inclusion outweigh the benefits. FWS's routine failure to designate critical habitat for endangered and threatened species compromises the Act's chances for success. Opponents of reform rely on the statutory language contained in section 4 to defend their position that the Act sufficiently considers economic impacts. This argument is deficient. As of September 1991, FWS had not designated critical habitat for 84% of all listed species. [*Endangered Species Act: Types and Number of Implementing Actions*, Briefing Report to the Chairman, Committee on Science, Space, and Technology, House of Representatives at 29 (U.S. General Accounting Office, May 1992).] This poor track record suggests that the FWS has not met the statute's mandate in designating critical habitat or fulfilling the congressional mandate.

FWS's consistent failure to designate critical habitat unquestionably subverts one of the few areas in the Act where legislative intent is clear. The legislative history for the Act's 1978 amendments evidences Congress's intent that

... in most situations the Secretary will, in fact, designate critical habitat at the time that a species is listed as either

endangered or threatened. It is *only in rare circumstances* where the specification of critical habitat concurrently with the listing would not be beneficial to the species.⁴

As a result of FWS' failure to designate critical habitat, the Austin FWS field office regulates development on all potential habitat. In the central Texas area, for example, FWS's failure to designate critical habitat for the Golden-cheeked warbler has resulted in the agency's regulation of all proposed development. Any action which would remove or impair vegetation purportedly "suitable" for the Golden-cheeked warbler is illegal without an ESA permit, regardless of whether the area has actually been used by the birds, on the grounds that the area *could be* used in the future. The agency also considers a "take" to include any development that is adjacent to occupied bird habitat, on the theory that future "secondary impacts" (e.g., preying house cats, competing blue jays, disturbing traffic noise), will impair the value of the habitat to the birds. As a result, the Austin FWS field office regulates all development in the region, covering several thousand parcels of land totaling approximately 250,000 acres. Even the construction of one single family home requires prior FWS approval. In the Austin area, the local FWS office currently wields more power over development in Travis County and the City of Austin than the planning commissioners or the local officials. To obtain FWS approval, a landowner must engage in a costly and time-consuming process to demonstrate there is no suitable habitat on or even near the subject property. In most cases, FWS requires a qualified biological consultant to make the determination through field surveys. In the case of the Golden-cheeked warbler, Austin FWS requires three consecutive years of field surveys. Warbler surveys are only admitted as acceptable proof if the surveys are conducted within a 66 day period, from March 15 to May 20.⁵ In addition, FWS requires an endangered species permit to conduct most field surveys, arguing that even surveys are a potential "take" of listed species. If FWS fails to sign-off on the project, the landowner faces severe enforcement penalties. Moreover, since the Act does not require notification of property owners that they own potential habitat of a listed endangered species, many individuals are unaware of their responsibilities. Congress should require that FWS provide written notice to all landowners within the species habitat.

Critical habitat designation is important because it identifies the areas

⁴ Act of Nov. 10, 1978, Pub. L. No. 95-632, §11(1), 92 Stat. 3751, 3764. H.R. Rep. No. 1825, 95th Cong. 2d. sess. (1978). [emphasis added].

⁵ U.S. Fish & Wildlife Service, Guidance Concerning Review of Endangered Species Habitat, April 1, 1992.

essential to the protection and recovery of listed species. Moreover, FWS must consider economic and other relevant impacts when it designates critical habitat. These considerations are not permitted at the listing stage. When the FWS does not designate critical habitat it ignores economic impacts. Congress should require a critical habitat designation at the time of listing and condition the Act's restrictions on these determinations. If FWS fails to designate critical habitat, the species' listing should be removed from the endangered list until critical habitat is designated.

Congress should mandate more efficient designation of critical habitat upon listing. As the statute stands, FWS is merely required to designate habitat to "prudent and determinable" extents. A more precise time limitation, such as within thirty days of the final listing rule, will guide the agency in its habitat designations and provide predictability for land owners. Since habitat range is one of the factors pivotal to a listing based on "best scientific and commercial data available," the 30-day requirement for habitat designation is not particularly or unduly onerous. Once the habitat is identified it can thereby become the center of, and provide guidance to, the habitat conservation planning process.

FWS often asserts that there is insufficient scientific data to support the designation of critical habitat. If deficiencies in the data exist at the time of the species listing, Congress should require FWS to collect and consider all necessary data. Too often the task of collecting and analyzing biological data is expected from the landowner at great expense. Furthermore, it is imperative that the information upon which a critical habitat is designated be based upon the best scientific and commercial data available. Locking up thousands of acres of land based upon arbitrary determinations of critical habitat is simply unacceptable. Congress, therefore, needs to make collection of sufficient and appropriate data for critical habitat designation a requirement, and a priority, of FWS.

HABITAT CONSERVATION PLANS

Third, Congress should revise the Section 10(a) incidental take permit. The Section 10(a) permit is critical as it is a landowner's sole remedy to the Act's land use prohibitions when no other federal action is necessary. The incidental take authorization procedures for regulated landowners are protracted and unclear, and frustrate landowners attempts to comply with the law. Ironically, even FWS recommends that private parties seeking HCP approval evaluate whether a proposed project contains a federal nexus that would qualify it for the section 7 permit process designed for federal agencies. Unfortunately, many federal agencies refuse to perform section 7 consultations when granting their own permits because of the shortage of staff or the paperwork requirements. Thus, many private landowners are left in an untenable position with few acceptable alternatives.

The Act's statutory language vaguely describes the necessary components of an HCP, and the FWS regulations merely reiterate the Act's imprecise criteria. HCP guidelines should be developed for each listed species to

advise participants on the essential elements of any plan, on what value the FWS ascribes to habitat enhancement or other conservation measures, and how to measure the success or failure of the plan.

In the past, FWS has been unwilling to offer definitive guidelines in crafting an acceptable HCP. Although the FWS has routinely attended all HCP planning sessions, the agency typically refuses to indicate whether it will find the plan acceptable or whether a particular component will prevent their approval of the HCP. Meaningful FWS involvement at all stages can introduce reliability, equality, and efficiency to the HCP process. Without FWS commitment, local officials and landowners alike face federal regulations that impose stringent land use restrictions based on loosely defined criteria.

Congress should require FWS to furnish definitive guidelines, specific to the focal species, as to what constitutes an acceptable habitat conservation plan.

HCP guidelines should be developed to advise participants on the essential elements of any plan, on what value the FWS ascribes to habitat enhancement or other conservation measures, and how to measure the success or failure of the plan.

Moreover, the Act accords preferential treatment to federal agency actions through the Section 7 consultation process. The Section 7 process, for example, has a prescribed timetable within which FWS must render a final decision. As a result, this permit is by far the most common. During fiscal years 1987 to 1991, FWS processed 2,050 Section 7 federal agency consultations. In contrast, the FWS has approved less than 20 HCPs nationwide. Frankly, the Section 10(a) HCP process is an open-ended, bureaucratic black hole. The inequities between the two exemption processes should be eliminated, and private landowners should be afforded the same treatment as federal agencies.

Regional habitat planning can address some, but not many, of the regulated landowner compliance issues. The existing interagency consultation procedure under Section 7, which is now limited to federal projects, can be improved to assist in that regard. Congress could extend the Section 7 consultation process and time frames to non-federal projects. In addition, Congress could consider allowing small and other low-impact projects to proceed under general permits similar to the Corps of Engineers Nationwide Permit program developed pursuant to the Clean Water Act.

There have been arguments in the past that the solution to the disparity between the Section 7 and the Section 10(a) process can be solved through regional planning options like Austin's Balcones Canyonlands Conservation Plan (BCCP). To be sure, regional planning offers an opportunity to take advantage of comprehensive planning and economy of scale, both of which can benefit species and landowners in the right conditions, but regional planning is not without significant problems of its own. Regional planning, however, is not a panacea for every endangered species conservation dispute. The right dynamics of local politics, consensus, economics, and land use have to be present for regional

planning to work. For example, while regional planning may help some Austin landowners, it will not help those with immediate, low impact development plans. It is unfair and ineffective to ask these landowners or prospective home buyers to put their plans on hold for over seven years while a regional solution is being formed.

Prospective home owners, who wish to build a home in Travis County, find it hard to understand why they will need an incidental take permit to build a house on a partially cleared lot surrounded by existing homes. Despite the lengthy permitting process and the exorbitant associated costs, some home buyers still chose to pursue their dream home. Yet even when they hire a trained biologist who, after careful inspection and survey of the property, concludes that harm to the warbler is unlikely, they are denied the right to build. The Austin FWS office has adopted a policy that remote, intangible secondary effects of home construction *could possibly* affect a warbler, and therefore require an incidental take permit. Other laws allow for "permit by rule" to address these situations. Section 404 of the Clean Water Act, for example, exempts many low-impact actions from the burden of individual permitting procedures. This permit by rule approach could be sensibly applied to the ESA.

THE BALCONES CANYONLANDS CONSERVATION PLAN

In Austin, the stringent land use restrictions imposed by the Act prompted the commencement of the BCCP, a multi-species habitat conservation plan on a grand scale. Interior Secretary Babbitt has praised the BCCP as the "model for the nation." Unfortunately, Austin home builders are not convinced that the BCCP is the remedy to Austin's endangered species problems. The BCCP was started over five years ago and is still incomplete. The plans problems remain insurmountable despite the Secretary's direct and personal involvement.

First, there were process problems. The two key concepts of any HCP -- the financial framework and the biological data -- were deemed non-negotiable from the beginning. As a result, Austin builders did not believe they were true partners in the planning process or part of a meaningful dialogue aimed at resolving the outstanding issues. The National Biological Survey (NBS) reviewed the existing biological data on the listed species that many builders believe was flawed. NBS also collected additional data on salamander. However, there was no opportunity for public review of the NBS's analysis. Moreover, in September 1994, NBS Director Dr. Pulliam assured NAHB members in person that the NBS would never be used for regulatory purposes. Less than four months later his promise had been broken. These limitations in the process created the impression that there was little opportunity to develop an acceptable and equitable plan.

Second, the habitat plan proposed by Interior improperly regulates all habitat modification. The Department of Justice in their petition for the Supreme Court to grant *certiorari* for the Sweet Home case requires "actual injury or death" directly traceable to habitat-disturbing activities. The proposed HCP regulates all modifications of occupied and likely-to-be-occupied habitat, regardless of whether

there is "actual injury or death" as a result of the habitat modifications. Austin builders believe that the broad prohibitions on all habitat modification, as proposed in the plan, are much more restrictive than the law actually requires.

Third, the plan does not provide Austin builders with the certainty they require. After reviewing the proposed plan, builders were still unclear as to what land is regulated and how much the regulated land will cost to develop. For example, the habitat maps for calculating the participation fees were not available for public review and may be modified in the future. The participation certificate fees were also subject to change; they would be indexed to land prices annually after the initial two years. Additionally, the plan does not discuss how future listings of species will be integrated into the plan, especially aquatic species such as the Barton Springs salamander. Future listings may impose additional and/or increased development fees on builders. Further, landowners do not know if there will be further, unidentified operational constraints on developments that follow the plan. Many of the individual section 10(a) permits approved in the past few years placed multiple operational constraints on new development. Lastly, the plan does not state if the participation fees will be terminated when preserves are complete.

Consequently, Austin builders believed they were left with no choice but to accept a flawed, incomplete plan or decline to participate in process. After trying to work with FWS to develop a plan acceptable to both the development and environmental communities we withdrew from the process. We remain committed to the concept of habitat conservation plans as a regional solution to species preservation. HCPs can sometimes provide certainty for developers and species preservation in a cost effective manner. However, Austin builders remain unconvinced that the plan proposed would not achieve those important objectives.

COST-SHARING

Fourth, species preservation exacts a heavy financial burden on the local community and individual land owners. The federal government should share the cost. Preparation and implementation of the BCCP is estimated to cost over \$168 million. The funding for the plan is derived largely from two sources: the City of Austin and Travis County and the land owners who own the remaining land that FWS has deemed as suitable habitat. Land acquisition costs are approximately one-third of the BCCP total cost. A voluntary habitat mitigation assessment, levied on a per acre basis, will be "contributed" by developers and builders to pay for the operation and maintenance of the habitat preserves. Implementation of the plan is estimated to exceed \$168 million. If species preservation is deemed a worthy national goal the federal government should share in the responsibility for the cost. In Austin, FWS does not intend to contribute to the cost of the plan. In fact, FWS forbid the proposed Post Oak National Wildlife Refuge in Austin to be used as habitat mitigation for the BCCP. Perhaps if FWS was required to contribute 50% of the costs of the BCCP, FWS would be less ambitious and more critical of the plan's grand scheme.

In the BCCP draft, FWS opined that the federal government should not share the financial burden of developing an HCP, since an HCP's purpose is to allow for the incidental taking of wildlife species which are a "public commodity." FWS's flawed reasoning suggests that landowners should continue to bear the sole financial burden of developing the conservation plans, which ensure species will recover from endangerment, solely because the plan will also enable landowners to realize some value from his land. Landowners already contribute significantly to species preservation by donating thousands of acres of essential habitat. Landowners are also the largest financial contributors to HCP's development and implementation. It is important that Congress and FWS recognizes that landowners are not working to take species, but conversely, they are working to preserve species, and therefore should receive federal assistance. Ironically, the San Bruno Mountain HCP which served as the model for the HCP process when it was incorporated into the ESA was largely funded by the federal government, directly through the Land and Water Conservation Fund and indirectly through land donations for the butterfly preserves.

COMPENSATION

Fifth, and most importantly, the Act imposes stringent limitations, both temporary and permanent, on the use of private property. In Texas, where there are 82 listed species and 305 candidate species, over 95 percent of the land is in private ownership. As a result, the vast majority of endangered species habitat is owned by private citizens, not the federal or state governments.

As written, the statute confers no private cause of action upon a landowner when deprived of private property. The Act's stringent limitations on the use of private property necessitates that land owners be compensated when no viable use of their property remains. Our nation's rare plant and wildlife are worthy of preservation. However, the expense should be shared by all. Congress must recognize that property owners deprived of economically viable use of their property, as a result of the Act's prohibitions, are due compensation. Congress should require FWS to formulate a claims process and strict timetable for requesting and offering restitution. All disputes should be referred to arbitration for resolution.

CONCLUSION

Time, certainty, and predictability are crucial to all parties affected by the Endangered Species Act. Endangered and threatened species need the Act's protection to be established quickly to assure the species' continued existence. Property owners need critical habitat established quickly to determine the extent of the restrictions on their property to assure continued financial stability. The Act must provide incentives for property owners to undertake the time-consuming, expensive tasks necessary to preserve our precious environmental resources and still contribute to the growth of the economy. The recommendations offered in this testimony add certainty to the process, provide prompt responses to the

concerns of officials and property owners, and are sensitive to the needs of protecting endangered species.

I greatly appreciate the opportunity to testify at this hearing. For your information, I submit for the record several case studies, including my own, that detail difficulties builders in this area have had as a result of the listing of the Golden-cheeked Warbler.

ENDANGERED SPECIES CASE STUDY

SPECIES:	Golden-cheeked Warbler (<i>Dendroica chrysoparia</i>)
HABITAT:	Mid-successional scrub. Predominate vegetation type: Shin Oak, Ashe Juniper, Texas Oak, Plateau Live Oak, and other woody vegetation in a partially enclosed canopy.
RANGE:	Breeds in 54 Texas counties from March 15 to July 15; Winters in southern Mexico and northern central America.
ESA LISTING:	U.S. FWS, May 4, 1990
PROJECT LOCATION:	Austin, Texas
PROJECT DESCRIPTION:	Jester Point in Austin, Texas is a 1100 lot residential subdivision. It is adjacent to the completed 300 lot subdivision Jester Estates.
COSTS/MONEY SPENT:	\$5,000,000 -- Mortgage loan \$1,500,000 -- water approach mains \$ 850,00 -- road and platting amendments \$ 700,00 -- sewer approach mains \$ 500,00 -- amenities area improvements \$ 14,800 -- Security to protect the construction equipment.
DECISION TIME-FRAME/ CHRONOLOGY:	In March 1990, Jester Development began construction on phase two of Jester Estates, a 400 lot section. These lots had previously been approved for development by the City, however, Jester vacated a portion of the plat in 1988 to accommodate a new arterial which would provide regional access to the project.

In April 1990 the U.S. Fish and Wildlife Service (FWS) deliver a letter to Jester claiming that someone had identified a cave on the site which contained endangered cave invertebrates. On May 5, 1990 FWS emergency listed the Golden-cheeked Warbler.

Jester required a utility line across a dry creek (a waterway of the U.S.), they were required to obtain a Section 404 Army Corps of Engineers permit pursuant to the Clean Water Act. As a result of another federal agency's involvement, Jester was also required to obtain a Section 7 permit from FWS pursuant to the Endangered Species Act.

The builder applied for a section 7 permit in May 1990. Partial release of the property was granted in late September for 37 lots. 33 developed lots, and all platted, but undeveloped lots were not released. The actual work of installing the utility line took two weeks.

In December 1990, Jester met with FWS and the Corps to re-initiate the Section 7 consultation process. FWS requested that Jester complete two years of warbler surveys. FWS mandates that the warbler surveys can only be completed between April 1 and May 30. In May 1991, with documentation that no warblers existed within 500' of the subject property, Jester made a formal written request for release of the property (approximately 65 acres and 135 lots). Jester was able to document warblers nesting within 150' of previously built houses in their subdivision. When the approval was not received by October 1991, Jester began meeting with FWS on a weekly basis. Finally, on March 2, 1992 FWS released the Jester property, at the same day the bank foreclosed on the property.

The bank has since sold the 65 acres. The lots are now developed and only a few remain without homes. In January 1995 the remaining 291 undeveloped lots were sold as a preserve for \$5,400 per acre. In 1988 the Appraisal District valued the property at \$23,200 per acre.

PROBLEM SUMMARY:

The Golden-cheeked Warbler spends eight months out of every year in Guatemala and Mexico. The remaining time it migrates to Texas to nest and breed.

ENDANGERED SPECIES CASE STUDY

- SPECIES:** Golden-cheeked warbler (*Dendroica chrysoparia*)
Black-capped vireo (*Vireo atricapillus*)
- HABITAT:** Mature Oak/Juniper woodland. Predominate vegetation type: Shin Oak, Ashe Juniper, Texas Oak, Plateau Live Oak, and other woody vegetation in a mostly enclosed canopy.
- RANGE:** The warbler breeds in 35 Texas counties from March 15 to July 15 and winters in southern Mexico and northern central America.
- The vireo has been recorded in 50 Texas counties. It winters along the west coast of Mexico.
- ESA LISTING:** Warbler: Endangered, U.S. FWS, Emergency Listing:
May 4, 1990, Final Rule December 27,
1990.
Vireo: Endangered, U.S. FWS, 1987
- PROJECT LOCATION:** Davenport Ranch, Austin, Texas
- PROJECT DESCRIPTION:** Residential and commercial development on 1300 acres
- MONEY SPENT:** \$ 95,940 -- Legal and other Consulting fees
\$2,029,416 -- Holding Costs
\$5,263,000 -- Value of acres donated to Wild Basin Wildlife Preserve
-
- \$7,388,356 TOTAL COSTS
- CHRONOLOGY:** In 1967, a 1300 acre parcel was purchased and put into a family trust. In 1977, the owners submitted a master plan for development of the property to the Austin Planning Commission and the City Council. The Council approved the plan in 1979. At approximately the same time, the owners donated 74 acres to the newly formed Wild Basin Wildlife Preserve, which was adjacent to the property.
- The first phase of the development was completed by 1986. In 1987, FWS listed the Black-capped vireo as an endangered species. The owners donated an

additional 62 acres of land to the Preserve and sold 150 acres to the City of Austin for additional preserve habitat. In 1990, FWS listed the Golden-cheeked warbler as endangered. The owners contacted FWS to determine if their remaining undeveloped land included any listed species' habitat. FWS authorized development for portions of the project's undeveloped lands and cleared some of the already developed lots for home construction. FWS put an indefinite hold on 17 contiguous lots and restricted construction on 6 contiguous lots, all of these lots were developed in 1985. Of the 6 lots which were restricted, 3 of them had existing homes or homes under construction.

In 1991, FWS permitted construction to proceed on one of the 17 lots on hold. Since the subject lot was in the middle of the other 16 lots on hold, the Davenport Ranch owners believed that FWS had changed their position on keeping the lots on hold. Davenport deceived to proceed with paving an existing dirt roadway which was previously excavated and had utilities installed in 1985 but was never completed. Davenport Ranch had maps from the City of Austin showing the limits of vireo territory and determined that the roadway could be paved without harming any habitat since it was already existing, and that in the worst case four lots would be available for sale based on the territory map. After the roadway was completed FWS notified the owners that their construction activities possibly violated the Act and the agency threatened the owners with enforcement. FWS stated that their release of the individual lot was in error.

After an investigation, FWS revoked the "possible violation" charge but placed all 16 of the newly paved lots on permanent hold, converted the 6 lots that were previously restricted to permanent hold and added 2 additional lots to permanent hold. The total number of lots on hold is 37. The value of the lots is in excess of \$3,500,000.

In Spring 1992, a female Black-capped vireo chose to nest on one lot and had four fledglings. By this time, the Balcones Canyonlands Conservation Plan was not near completion, despite over five years of preparation. Thus, the owners' sole remedy was to file an individual Section 10(a) permit requesting an incidental take permit for the remaining 21 lots. The application was filed on March 8, 1993.

PROBLEM SUMMARY:

The Act accords preferential treatment to federal agency actions through the Section 7 consultation process. The Section 7 process, for example, has a prescribed timetable within which FWS must render a final decision. As a result, this permit is by far the most common. In contrast, FWS has approved less than 20 HCPs nationwide. The Section 10(a) HCP process is an open-ended, bureaucratic black hole. The inequities between the two exemption processes should be eliminated, and private landowners should be afforded the same treatment as federal agencies.

ENDANGERED SPECIES CASE STUDY

SPECIES:	Golden-cheeked Warbler (<i>Dendroica chrysoparia</i>)
HABITAT:	Mature Oak/Juniper Woodland. Predominate vegetation type: Shin Oak, Ashe Juniper, Texas Oak, Plateau Live Oak, and other woody vegetation in a partially enclosed canopy.
RANGE:	Breeds in 35 Texas counties from March 15 to July 15; Winters in southern Mexico and northern central America.
ESA LISTING:	Endangered, U.S. FWS, Emergency Listing: May 4, 1990, Final Rule: December 27, 1990.
PROJECT LOCATION:	Diamond Sky Subdivision, Austin, Texas
PROJECT DESCRIPTION:	Single-family home, 3,000 square feet
COSTS/MONEY SPENT:	\$ 300 -- Architects & contractors fees \$ 1300 -- Biological survey \$10,000 -- Subdivision survey \$11,600 TOTAL COSTS
CHRONOLOGY:	Diamond Sky Subdivision is a 55 acre tract of land subdivided into four lots. The first lot, a 15 acre parcel, was placed under contract to Linda Fernandez in February 1992. The Fernandez family hoped to build a modest home on the lot. In April 1992, the landowner contacted the Austin FWS office to determine if the property was considered endangered species' habitat. FWS informed the landowner that the property contained "potential habitat" for the Golden-cheeked warbler and that "land-clearing may be prohibited." FWS suggested that the owner hire a qualified biological consultant to undertake 3 field surveys of the property within the warbler's March 15 - May 20 nesting season. The biologist hired to conduct the bird surveys observed 2 young warblers, away from the nest, in the lowlands of the lot and located four warbler territories along the slopes. As

a result, FWS denied construction authorization for the Fernandez's home.

The Fernandez family redesigned their plans, siting their home over 900 feet away from where the warblers were sighted, and into an area classifies as the "least preferable" area of potential habitat since it was adjacent to a busy two-lane highway. Moreover, the builder agreed to build only during the off-season, when the warbler's wintered in Guatemala, and leave all of the nesting and foraging territories undisturbed. The final proposed building plan left over 95% of the parcel uncleared. FWS still refused to permit the construction, informing the Fernandez family that construction on the site would be at their own risk. Further, FWS warned the Fernandez family of the significant civil and criminal penalties under the Act. FWS suggested that the landowner and/or the Fernandez family file an individual Section 10(a) permit.

An individual Section 10(a) permit is a costly and time-consuming process. A University of Texas study calculated that the average Section 10(a) permit cost over \$9,000 an acre to complete. The likely cost of a permit for the property, therefore, was estimated at \$135,000. This was substantially more than the entire parcel was worth.

In 1991, the land owner had the property appraised at \$1.2 million. Recently, the Texas County Appraisal District valued the land at \$363, 200. Moreover, it is unclear if FWS will permit any economically viable use on the property.

PROBLEM SUMMARY:

FWS routinely fails to designate critical habitat for listed species. As a result, FWS regulates development on all **potential** habitat. In Austin, virtually every proposed development, even the construction of a single family home, requires prior FWS approval.

Critical habitat designation is important because it identifies the areas essential to the protection and recovery of listed species. Moreover, FWS must consider economic impacts when it designates critical habitat. These considerations are not permitted at the listing stage. When FWS does not designate critical habitat, it ignores economic impacts. Congress should require critical habitat designation at the listing stage.

ENDANGERED SPECIES CASE STUDY

SPECIES: Golden-cheeked Warbler (*Dendroica chrysoparia*)

HABITAT: Mature Oak/Juniper Woodland. Predominate vegetation type: Shin Oak, Ashe Juniper, Texas Oak, Plateau Live Oak, and other woody vegetation in a mostly enclosed canopy.

RANGE: Breeds in 35 Texas counties from March 15 to July 15; Winters in southern Mexico and northern central America.

ESA LISTING: Endangered, U.S. FWS, Emergency Listing: May 4, 1990, Final Rule: December 27, 1990.

PROJECT LOCATION: Canyon Ridge, Austin, Texas

PROJECT DESCRIPTION: Residential and commercial development on 197 acres

COSTS/MONEY SPENT: \$75,000 -- Architects & contractors fees
 \$10,000 -- Biological survey
 \$30,000 -- Consulting\Legal Fees for permit
 \$62,000 -- for warbler research and preserve management
 \$315,250 -- value of 97 acres dedicated as a greenbelt

\$492,250 TOTAL COSTS

CHRONOLOGY: The Beard Family has owned a 197 acre parcel for over 100 years. In the early 1980's when the Family realized they could not afford to pay rising property taxes, they decided to develop the property. The land was zoned for residential and commercial uses. By 1990, a master plan was complete for the parcel. Soon after, the Golden-cheeked warbler was listed.

The Beard Family consulted with FWS to determine if the proposed plan would "take" the warbler or its habitat. FWS stated it was likely a taking would occur with any landclearing. FWS suggested that the Family wait for the approval of the Balcones Canyonlands Conservation Plan (BCCP), a regional Habitat Conservation Plan (HCP), which was anticipated to be complete in one year. The Beard Family agreed to wait for several reasons: 1) individual Section 10(a) permits are expensive and time-consuming, 2) FWS prefers regional HCPs since they are more comprehensive, and 3) FWS requires a higher ratio of mitigation for individual Section 10(a) permits.

By late 1992, when the BCCP wasn't near completion, the Beard Family decided they could not wait any longer. The Beard family requested that EPA initiate a Section 7 consultation with FWS since the proposed development required a National Pollution Discharge Elimination System stormwater discharge permit. EPA refused to initiate consultation as the agency claimed it lacked the necessary staff. The Section 7 consultation is preferable to most applicants since there is a prescribed timetable for FWS action on the application.

Without any other options, the Family hired a biological consultant to prepare an individual Section 10(a) permit for the proposed development and filed it with FWS on October 1992. After six months of review, in late April 1993 FWS published notice of the application in the *Federal Register* for public comment. The applicant expects a decision by August 1993, however, there has not been agreement between the applicant and FWS on the issues of take and mitigation. The BCCP is still far incomplete after more than five years in the planning stage.

PROBLEM SUMMARY:

The Section 10(a) permit process does not have a timetable for FWS action on the application. As a result, even applicants are not assured a timely decision. The Section 7 consultation process, which has a detailed timetable for decisions, is not available to private applicants. Moreover, even where federal involvement exists, such as the requirement of an NPDES permit, the federal agency often is unwilling to carry out its mandate under Section 7 to benefit a non-federal applicant.

As currently implemented, the Act leaves the applicant to play wildlife biologist. Neither the statute nor FWS's regulations define specific parameters for harm and "take" for listed species. Furthermore, FWS does not provide general guidelines on mitigation. Thus, the Act, hailed as proactive legislation, is being implemented in a reactive fashion, causing harm to both endangered species and private landowners.

STATEMENT BY ROBERT BRANDES

**To The
House of Representatives
Committee on Resources**

ENDANGERED SPECIES HEARING

**Boerne, Texas
20 March 1995**

The following testimony and exhibits on the Endangered Species Act are being submitted for inclusion in the Federal Public Record for the US House of Representatives Committee on Resources' March 20, 1995, Boerne, Texas hearing.

Mr. Chairman, Committee members thank you for the opportunity to address what has become this most controversial and divisive of issues: environmental protection vs. property rights.

My name is Robert Brandes. I have previously served on two regional committees as representative of the small landowner. Both the Balcones Canyonslands Conservation Plan (BCCP) and the Conserve As You Grow (CAYG) were failed attempts to develop a fair and equitable regional Habitat Conservation Plan (HCP) under the guidance of the US Fish & Wildlife Service (the Service). There is currently a renewed effort in Austin, Texas to resurrect the flawed BCCP.

You could not have come to a more fitting locale than Central Texas to hear first-hand of the controversy surrounding the Service's interpretation, implementation and enforcement of the Endangered Species Act (ESA). The Texas hill country and Austin/Travis County, Texas in particular, have been for six plus years a "take no prisoners" battleground over the ESA, its enforcement by the US Fish & Wildlife Service and the general landowning public's property rights. And, as in most wars, the fight is over beliefs, freedoms and conquests.

Let us never forget that prior wars have been fought and lives have been sacrificed to protect a very sacred right, the right to own and responsibly utilize private property. While the concept is fundamental and often taken for granted in this country, it is only a distant dream in many others. It is this concept of private property that has historically set America apart from much of the rest of the world. We are today again fighting to preserve that right. Fighting to prevent our own government from bureaucratically mandating our constitutional rights away.

The Endangered Species Act, however well intentioned at its inception, has strayed far off course. It has become the catalyst for enormously destructive local and regional "environmental" battles. Prominent among these is who controls the responsible and historic usage of privately owned lands. This debate reaches to the very heart of our traditional concept of property ownership and rights. Saving endangered species often appears a distant bi-product lost in the maze of other controversial ESA issues and agendas.

Recently however, it seems that our country's historic understanding and concept of land ownership and use is rapidly being modified by the current enforcement policies and interpretations of the Endangered Species Act. Dangerous and fundamental conceptual changes in property rights are occurring with the

blessing of the Department of Interior (Interior) through the independent and unregulated actions of a single government agency, the US Fish & Wildlife Service.

Alarminglly, the changes are not coming within the framework of the democratic process. They are occurring through bureaucratically mandated regulations and strategically organized group pressures. Destroying either the Constitution or the integrity of the constitutional process will not save the environment or endangered species. It will, however, do grave damage to our system of government.

If there ever was a situation ripe for abuse it is this one in which the Service, a small, ill-prepared federal agency, is handed massive amounts of arbitrary regulatory power with little or no checks and balances. Simply put, the Endangered Species Act in its present form is beyond Interior's willingness or the Service's capabilities to fairly and equitably administer. The Act's inherent vagueness and generalities often result in massive mis-applications of federal authority that then become economically disastrous for significant portions of the country's property owners (Exhibit I). Even then Governor Ann Richards publicly rebuked the Service's tactics as "ham handed".

I also encourage looking beyond the Service's so called accommodations and private landowner solutions. In many cases their cure is almost as punitive as the disease, the Endangered Species Act itself. So please keep in mind that it's not so much what the Service tells you, it is what they don't tell you that is the problem.

The ESA has become the government's and environmentalist's weapon of choice to acquire land without actually paying for it. If enough restrictions or controls can be bureaucratically placed on property there is no need to acquire it. Why bother paying for land when it is already owned de facto. This confiscatory attitude unfortunately prevails today in some governmental and environmental circles. It must be changed legislatively.

And all too often we hear that federal or other funds do not exist to acquire lands needed to protect species and the burden of payment should fall on the individual landowners. This is both unfair and inequitable not to mention unrealistic.

This cynical and predatory environmentalist/governmental attitude has contributed directly to the current environmental/landowner mess we as a country find ourselves in today. Realism and common sense must replace idealism and wishful thinking if any endangered species are to be protected.

In the Central Texas hill country the Fish and Wildlife Service has become more a source of the problem than a part of the solution. Their constant reinterpreting, reinventing and modifying of the ESA makes compliance all but impossible. This, coupled with the Service's intransigent and Draconian enforcement methods, results in the landowners becoming reluctant to voluntarily acknowledge species habitation or even co-operate with species preservation activities.

The Service has, for all intents and purposes, put the Texas hill country under environmental "Marshall Law". In order to utilize land today every landowner within a vast expanse of Central Texas must now receive clearance from the Service or face the threat of possible federal prosecution. This bureaucratic intimidation has no place in our society. It tends to make potential lawbreakers out of otherwise law abiding citizens. The Service has become the enemy within.

Paradoxically, from a practical standpoint, the Service is probably the single greatest cause of habitat destruction in the Central Texas region. To have endangered species today on one's property in Central Texas is the kiss of death. It is to lose all or part of the property's use for other than endangered species protection unless a substantial payment is made in the form of a mitigation fee for the "take" of habitat. Sort of a High Sheriff of Nottingham mentality resulting in clandestine habit destruction by landowners who accurately perceive that compliance with the Service's regulations are simply too difficult and/or expensive. Governor Ann Richards confirmed this in her letter to Bruce Babbitt (Exhibit 2) as did State Representative Susan Combs in her letter to Mr. Sam Hamilton of the Service (Exhibit 3). A sad irony and dismal bureaucratic record.

The ESA is also vulnerable to abuse by special interests as evidenced by the BCCP's history. Here in Texas, politicians, the Service, organized environmental groups, land acquisition trusts such as The Nature Conservancy and large, influential landowners have one and all used the good intentions of the ESA for personal, political or economic gain. One need only look at the history of events that have recently taken place in Austin, Texas to understand the ESA's vulnerability to abuse and misuse.

The BCCP, our regional plan, has failed in all previous attempts. It has from day one been a special interest plan. The Service apparently wants the Austin HCP to demonstrate that the ESA works whether the plan itself works or not. Some local politicians want the plan simply to put on their political resumes. Environmental organizations want it to stave off development in certain areas and acquire parks and green areas at little or no cost to themselves or the public. Public land

acquisition groups such as The Nature Conservancy want the plan because they are the real estate brokers in the process. And large land developers want the plan because it gives them an economic advantage over less well funded and sophisticated entities such as small landowners, farmers and ranchers. Economic viability or environmental success of the plan is not the driving force. Implementation is.

It is no secret that the Secretary of Interior and the Service have been trying through strict enforcement of the ESA in the Austin area to force the community into accepting a regional Habitat Conservation Plan. Whether it is flawed, makes sense economically or is environmentally sound is not the issue. A plan at any cost to bolster support for ESA reauthorization appears to be the goal.

The ESA, as enforced today, is quite simply a disaster. While offering the illusions of an extremely strong federal law, the Endangered Species Act, because of its inherent vagueness, leaves itself open to multiple interpretations. When the ESA's vagueness, general obfuscation and lack of solid guidelines are combined with the Service's questionable interpretations and selective enforcement (Exhibits 4-7) of the ESA, an untenable situation arises. This places the general landowning public subject to the whims of the controlling federal agency responsible for ESA enforcement. Examples abound: random and varied enforcement policies, knee jerk acceptance of the listing petition for the Golden Cheeked warbler (Exhibit 8), refusal to reach timely decisions, constantly changing rules and regulations, etc. The resulting bureaucratic nightmare leaves affected communities, businesses and landowners at a complete loss as to how to proceed with normal day to day operations. Not to mention the Service's possible intentional and certainly unintentional infringements on the constitutional rights of Texas and its citizens.

The Service's broad powers under the ESA must either be redefined or strictly limited. The current situation is unacceptable under our form of government. Too much unregulated authority is granted the Service. The agency often appears drunk with power and unfortunately uses that power to intimidate. As when the Service's State Administrator called a meeting of some 60+ federal agencies operating in Central Texas to inform them that their activities would have to be reviewed and approved by the Service (Exhibit 9). This, coming on the heels of the critical habitat debate, was clearly an attempt by the Service to intimidate Central Texans.

Another area of concern is the attempt to influence local elections by major tax exempt environmental organizations that have a vested economic interest in the outcome. While this may or may not be illegal, it certainly constitutes substantial conflicts of interests. The Nature Conservancy is ostensibly loaning and/or

donating funds in an effort to influence the outcome of local elections in which they stand to benefit greatly (Exhibit 10). If these enormously influential and wealthy organizations are to be allowed to maintain their privileged tax exempt status in the environmental debates and issues of the day they must be held to higher standards.

It must also be recognized that regional Habitat Conservation Plans have some inherently dangerous deficiencies. They must be viewed from an economic benefit perspective. They are major development blueprints. And as such determine: who gets to develop, where they get to develop, when they get to develop, how much they get to develop and how much these rights or privileges cost.

With the foregoing in mind, it's easy to see that millions of dollars in potential economic benefits are to be derived from securing these development rights. As a result, wealthy and influential special interests are combining with the local politically ambitious. This powerful alliance, whether from the environmental or landowner side, begins to play a significant and corrupting role in the process' integrity. These detrimental, undermining forces must be identified and stopped if there are to be any realistic or fair solutions to endangered species problem.

There must also be recognition of the fact that landowners who have maintained the environmental integrity of their land up to the present must not now be required to carry disproportionate economic burdens of preserving endangered species. Rather than being singled out and punished financially they should, at the very least, be recognized and good land stewardship rewarded.

If protecting the environment is good for all then all should share in the cost. Singling out portions of the citizenry to solve national or global environmental problems is unworkable, hypocritical and arrogant. It is completely unacceptable for landowners to be told by those who have destroyed the environment in their particularly geographic areas that the remaining responsible landowners must now bear the preservation burdens, both financially and otherwise, for all.

Major changes must be made if the Endangered Species Act is to have even a remote chance of success. It must be made user-friendly. Today's version is not. The irresponsible bureaucracies must be reigned in. And last, the costs of implementing the saving of endangered species must be borne nationally and not by a few geographically unlucky landowners or areas. Local funds of the magnitude needed simply do not exist. If it's a national issue it should be funded nationally.

Thank you for this opportunity to submit my comments on this most important of national issues. Supporting exhibits are attached.

Austin American-Statesman

COMMENTARY

EDITORIALS

Salamander skirmish is more politics than science

The six-month delay on determining the endangered status of the Barton Springs salamander is ample proof that more politics than science is at work here.

Since it was first found in Barton Springs Pool several years ago, the salamander has been a potential political weapon in Austin's long-running battle with developers, Jim Bob Moffett's Barton Creek Properties in particular. Placing the amphibian on the federal endangered species list would add significantly to the arsenal of the environmentalists now battling Moffett with sword and shield.

Although Interior Secretary Bruce Babbitt's decision to delay was a blow to the environmentalists, it gives the state time to develop its own plan to maintain water quality at the springs. A local plan that will protect Austin's precious natural resource is preferable to federal involvement.

Austin's salamander skirmish mirrors the larger battle over the future of the Endangered Species Act now being fought in Congress. The newly muscled Republicans are threatening to pull the teeth right out of the law.

Texas Sen. Kay Bailey Hutchison has proposed a six-month moratorium on adding new species to the act. Others have threatened worse as the law surfaces for reauthorization. The House has already approved a moratorium on new additions to the endangered list through 1996.

The dispute over the Barton Springs salamander, though relatively unknown as threatened species go, is a perfect example of why there is so much discomfort with the Endangered Species Act—it's three parts politics

and one part biology. Even the Interior Secretary acknowledges as much and admits that the act needs an overhaul.

Arguing against Sen. Hutchison's proposal this week, Babbitt proposed revising the act to offer more consideration to economic development and scientific analysis and to exempt small landowners from many of its man-

dates. That may not please many environmentalists, but it is a sound position for the Interior Secretary to take.

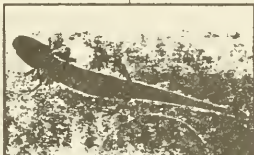
The Endangered Species Act was passed in 1973 to protect plants and animals threatened with extinction,

but it was soon hijacked by special interests. The act was removed from the realm of science and refashioned as a potent weapon to fight development and business interests.

As with the salamander, the species' protection has been subordinated to their political value. And the credibility and reputation of the environmental movement has been wrecked as the threatened plants and animals are crassly used as weapons of opposition. As a result, the act itself is now endangered.

Environmentalists have had to work hard to trash their movement so thoroughly, given that most Americans hold nature quite dear. But they have confused protection of fragile plants and animals with a larger agenda of political opposition and managed their own decline.

Unfortunately, the status of the salamander and the springs as endangered species depends too little on ecology and too much on politics.



Barton Springs salamander



STATE OF TEXAS
OFFICE OF THE GOVERNOR
AUSTIN, TEXAS 78711

LYN W. RICHARDS
GOVERNOR

September 12, 1994

The Honorable Bruce Babbitt
Secretary of the Interior
U. S. Department of the Interior
1849 C Street, N. W.
Washington, D.C. 20246

Dear Secretary Babbitt:

I contacted you in July regarding the Fish and Wildlife Service's plans to designate portions of thirty-three Texas counties as critical habitat for the golden-cheeked warbler. Since then your office has provided helpful information about both the requirements of the Endangered Species Act and the proposed critical habitat designation.

We can all remember and take pride in our efforts under the Act to save the bald eagle and the whooping crane from extinction. They demonstrate that the law can be implemented without infringing upon the legitimate rights of property owners.

But the Fish and Wildlife Service's approach to implementing the Act in Texas has become so overreaching that it undermines public support for protecting our wildlife. During the past decade, the agency's efforts to enforce the law and protect wildlife have created enormous problems for landowners — most of whom are proud of their reputations for being good stewards of the land. In some cases the agency's inability to respond in a timely way has been merely inconvenient for the public; in other cases it has literally robbed people of their financial security. Some property owners have waited for months, if not years, for the Fish and Wildlife Service to give them a permit to proceed with their plans.

So it was not surprising that citizens in thirty-three Central Texas counties were outraged to read in the newspapers that the Fish and Wildlife Service was considering designating even portions of this area — some 32,000 square miles — as critical habitat for the warbler.

I am writing to ask that you take the following actions to help correct this situation and bring common sense back into our efforts to preserve Texas' natural heritage:

1) The FWS should abandon all plans for designating critical habitat for the golden-cheeked warbler in thirty-three Central Texas counties. I have already expressed to you my concerns about the potential economic impacts of critical habitat designation in this region. Two additional factors justify a decision not to proceed with the critical habitat plan. First, because more than ninety-five percent of the region is privately owned, the federal activities which would be affected by designation of critical habitat are insignificant. Second, the FWS has in other cases declined to define critical habitat in cases where both the species and its habitat are widely dispersed. This is certainly the situation for the thirty-three county area proposed for study in Central Texas.

I want to emphasize that the state and various local governments are making solid progress toward protecting the warbler. This is evidenced by continued progress on a revised version of the Balcones Canyonlands Conservation Plan, acquisition of the "Government Canyon" area in Bexar County, and continued management of Central Texas' state parks and state wildlife management areas for species diversity. Additional, large scale federal action is not warranted.

2) The FWS should exempt normal agriculture and ranching activities in Central Texas from restrictions developed to protect warbler habitat. State biologists and others are convinced that these activities have little effect on the bird. Clearing of prime warbler habitat — mature mixed forests of hardwoods and cedars occurring along canyon walls — is impractical and prohibitively expensive. Furthermore, much of the region is now managed for recreation and to support deer and other wildlife populations in a manner compatible with the warbler's requirements. The warbler simply is not threatened by typical agricultural operations.

3) The FWS should refrain from listing the swift fox or the jaguar as threatened or endangered, and should work with the state to evaluate all listed species to identify those which could be downlisted or delisted. The Texas Parks and Wildlife Department has already joined with other states in the region to develop a conservation plan for the swift fox. This cooperative initiative with landowners should ensure the swift fox's protection and recovery without federal intervention. A similar effort should be undertaken for the jaguar. Listing the jaguar as an endangered species in the United States is not appropriate, as it has long since vanished from this country. If needed, the states of Texas, New Mexico, and Arizona could provide for the relocation of stray animals back into Mexico.

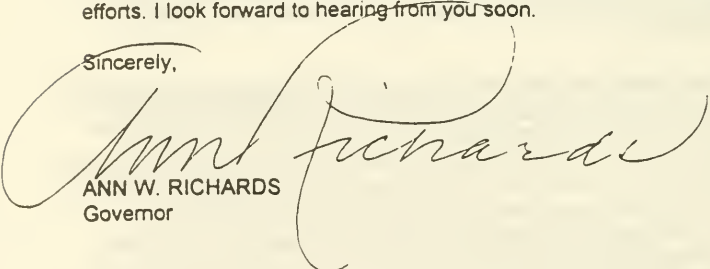
The Department is currently reviewing the status of all federally listed species and candidate species in Texas to see where actions might be taken to ease the burden of their protection on private landowners. Two species in particular, the black-capped vireo and the tobusch fishhook cactus, seem likely candidates for downlisting from endangered to threatened status, or even delisting. The Department will provide the Fish and Wildlife Service with additional information about these initiatives.

4) The Department of Interior, with leadership from your office, should initiate a thorough review of the Fish and Wildlife Service's overall approach to implementing the Endangered Species Act in Texas. Anecdotal evidence strongly suggests that the Fish and Wildlife Service's activities in Central Texas, however well-intentioned, have often produced absurd results. This problem did not begin with your administration, but you have an opportunity to address it.

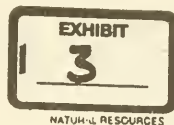
I recommend that your office convene a working group of Texas landowners, environmental leaders, state wildlife officials and others to assist in this review and to recommend improvements in the endangered species program. The group should also be charged with developing incentives for landowners to conserve wildlife habitat. Public-private partnerships offer the greatest potential for conserving important wildlife habitat in a state where nearly all land is privately owned. Texas has demonstrated that measurable benefits can be achieved by working cooperatively with landowners. The FWS should adopt the same approach, calling upon the expertise of Texans already involved in land conservation efforts. I would be pleased to provide you with recommendations for members of this group.

Implementing these recommendations will serve the needs of landowners as well as endangered wildlife, and help restore public confidence in conservation efforts. I look forward to hearing from you soon.

Sincerely,



ANN W. RICHARDS
Governor

STATE of TEXAS
HOUSE of REPRESENTATIVESSUSAN COMBS
DISTRICT 47

P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
512-403-0652
FAX: 400-0413

January 10, 1995

Mr. Sam Hamilton
U.S. Fish & Wildlife Service
300 East 8th Street, G167
Austin, Texas 78701

Dear Sam:

As you know, I have been concerned for months about the possibility of a proposal to help small landowners with the Endangered Species Act. Several weeks ago I called to ask about the current status of the BCCP and was assured by you at that time that you would keep me informed. I have heard nothing to date but have been made aware that you have been involved in the process yet you have not contacted me since that original conversation.

I must express to you that this kind of closed system has been a major issue in the "hot" private property rights debate. I am sure you understand my concern for my constituents and my having once again been excluded from the process. This closed process makes it impossible for me to represent my constituents and their respective interests. It is my understanding that environmental and real estate groups were involved with the City of Austin and the Department of Interior in formulating this plan that will be presented to the Austin City Council tomorrow. As I have expressed to Mayor Todd, this is not good government policy to exclude a majority of the citizens from the process that will indeed affect them.

In the future, I would appreciate your keeping me informed of issues such as these that directly impact my legislative district.

Sincerely,

SUSAN COMBS

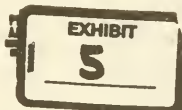


PRINTED ON RECYCLED PAPER



United States Department of the Interior

FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grants Bldg., Fourth Floor
Austin, Texas 78701



December 18, 1991

Ms. Lee Stone
City of Austin Nature Preserves Manager
301 Nature Center Drive
Austin, TX 78746

Dear Ms. Stone:

This pertains to a letter from you (dated August 14, 1991) to Ms. Jan Harp of Technical Services Division, Fish and Wildlife Enhancement, Albuquerque, New Mexico, requesting an assessment of whether certain activities at the City of Austin Vireo Preserve would be in violation of the Endangered Species Act (Act). One of the proposed activities you listed was the establishment of a fire break, which would involve cutting selected trees along the ridge line (Ridge Trail) of the preserve to allow emergency vehicle access. While you mentioned that this area was not occupied by the golden-cheeked warbler, ongoing surveys at the preserve provide evidence that black-capped vireos nested along Ridge Trail in 1991 and previous years.

In previous communications with you (letter from Robert M. Short, dated December 19, 1990; telephone conversations; meetings), the Fish and Wildlife Service (Service) stated that until information demonstrating successful habitat management techniques for the black-capped vireo could be produced on the preserve, the Service would be unwilling to approve manipulation of vegetation in occupied vireo habitat. Although Ms. Harp did not respond to your August 14 letter in writing, she indicated that you were verbally informed, prior to your letter, that clearing vegetation in occupied endangered species habitat could require a permit.

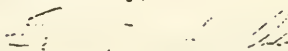
Despite these warnings, information now exists that clearing of occupied vireo habitat for the fire break has proceeded. Due to a possible violation of Section 9 of the Endangered Species Act, all further clearing activities on the preserve should cease immediately. You are also advised to contact me (512-482-5436) at the earliest possible date and arrange to meet with a representative from my staff and Special Agent Hasychak of the

Ms. Lee Stone
December 18, 1991

page 2

Division of Law Enforcement, in order to assess the extent of the damage that has occurred.

Sincerely,



Sam D. Hamilton
Field Supervisor

cc: Regional Director, Albuquerque, NM (FWS/AWE)
Alex Hasychak, San Antonio, TX (FWS/LE)
City Manager, City of Austin, Austin, TX



READING FILE

United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

OCT 28 1992

EXHIBIT

6

Ms. Lee Stone
City of Austin Nature Preserves Manager
301 Nature Center Drive
Austin, Texas 78746

Dear Ms. Stone:

This letter concludes our investigation of the clearing of black-capped vireo habitat along an existing trail at the City of Austin Vireo Preserve in order to establish a fire break and allow emergency vehicle access. We initiated the investigation of possible violations of the Endangered Species Act (ESA) pertaining to this activity in a letter to you dated December 18, 1991.

Based on surveys conducted during the 1992 vireo nesting season by the Texas Department of Transportation, Dr. Joseph Grzybowski, and Lisa O'Donnell of our staff, four male vireos occupied territories along either side of the trail. Three of these males were mated and at least two successfully fledged young. All four males were banded at the preserve in previous years and occupied territories in this same area. Based on this information, we have no evidence that a "take" resulted from the above-referenced activity and thus we do not believe that any violations of the ESA have occurred.

We still urge that no further clearing activities occur in vireo territories that have been occupied in the last three years prior to obtaining a permit under Section 10 of the ESA. However, as we indicated in a letter to you dated December 19, 1990, you may proceed with vegetation manipulation in areas that have not been occupied by vireos or golden-cheeked warblers for at least three consecutive years, in order to make those areas suitable for vireos and/or warblers. We recommend that you notify us prior to any manipulation of vegetation on the preserve. We also request that, with advance notice, biologists from our staff be permitted to conduct on-site inspections of any proposed activities in this area.

We understand that you are developing a management plan for the preserve, and would appreciate the opportunity to

Ms. Lee Stone

page 2

review the plan when it is completed.

If you have any questions regarding this response or need additional information, please contact Lisa O'Donnell of our staff at 512-482-5436.

Sincerely,

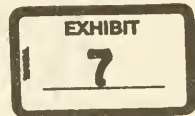
/s/ Jana Green

Sam D. Hamilton
State Administrator

cc: Regional Director, Albuquerque, NM (FWS/AWE)
Regional Solicitor, Department of Interior, Tulsa, OK
Alex Hasychak, Special Agent, San Antonio, TX (FWS/LE)
City Manager, City of Austin, Austin, TX



UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
Ecological Services
711 Stadium Dr. East, Suite 252
Arlington, Texas 76011



June 7, 1990

Mr. Robert Brandes
711 West 38th, Suite C4
Austin, TX 78705

Dear Mr. Brandes:

Alisa Shull, of this office, has followed-up on a possible violation of the Endangered Species Act (ESA) that you reported to her on May 25, 1990. The activity in question is recent construction of a building on Wild Basin Preserve in Travis County, Texas. This building is the new Interpretive Center, and the site on which it was built was not golden-cheeked warbler or black-capped vireo habitat. Therefore, this action does not constitute a violation of the ESA. We appreciate your concern and your bringing this matter to our attention.

In addition, I am enclosing a copy of the petition to emergency list the golden-cheeked warbler, as you requested. As Alisa indicated to you on May 25, the decision to emergency list this species was based on more information than that presented in the petition.

I am also enclosing a copy of the golden-cheeked warbler status survey for Ms. Hazlewood, as she requested. Please note the discussion on page 27 pertains to some of Ms. Hazlewood's questions.

Sincerely,

Robert M. Short
Robert M. Short
Field Supervisor

Enclosure
cc: Special Agent, LE, San Antonio



DF 441-1-1
not AS 441-1-2
Joe [signature]

February 1, 1990

Timothy Jones
3905 Avenue C
Austin, Texas 78751
(512) 467-0505

Alisa Shull, Wildlife Biologist
U.S. Fish and Wildlife Service
819 Taylor Street, Room 9A33
Fort Worth, Texas 76102

Dear Alisa,

Enclosed please find:

- (1) A City of Austin memorandum documenting the intent to clear land imminently at the Four Points Centre tract at the Northeast corner of R.R. 2222 and R.M. 620 at Four Points.
- (2) a memorandum from Dr. Charles Sexton, Environmental Specialist for the City of Austin, on the clarification of 'impacts on the Golden-cheeked Warbler by the proposed construction at Four Points Centre.
- (3) a map by Dr. Charles Sexton of the forty-one territories on the tract.
- (4) a land use plan (dated, but not significantly different from present plans) of Four Points Centre.

Despite the language in the memorandum by Austan Librach, our informants in the Department of Environmental Protection of the City of Austin, assure us that land clearing at Four Points is more in the interest of marketing the property than in growing goats. This obvious subterfuge to get around city regulations by using an agricultural exemption demonstrates the insincerity of the Perot interests in upholding the intent and spirit of the National Environmental Policy Act. By pushing this land clearing ahead of the GCW listing in such a manner, I do not think they consider the protection of this species anything but an annoyance to be circumvented. Thank you for your concern and your action toward the emergency listing of the GCW.

Sincerely,

[Signature]
Timothy Jones
Earth First!

P.S. You may consider this a formal petition for emergency listing.

Alisa, I have added a portion of the 7 1/2 min. (collapsible type) showing of Ft. Pl. tract, Shellburg and Lake Prospect. Outside this map, east on RR 2222 is the Beard Ranch tract comprising some 1000 acres with 67 GCW sightings indicating some 30 GCW territories (DLS 1989). All of these tracts are at some stage of the city growth. The removal of these combined habitat areas may constitute a greater threat to the GCW than it can tolerate and survive. The removal of these areas would be irreparable.

Agencies briefed on duties concerning aquifer, species

By Ralph K.M. Haurwitz
American-Statesman Staff

When the U.S. Department of Housing and Urban Development funds construction and operation of low-income apartments in San Antonio, it is supposed to consider whether such actions will have immediate or long-term effects on endangered species that depend on the southern Edwards Aquifer.

The connection between housing in San Antonio and rare plants and animals in springs at San Marcos and New Braunfels is not as remote as it might seem. For example, new toilets and faucets translate into additional withdrawals from the Edwards, a vast underground water system that supplies the city as well as the natural springs.

Yet HUD has never formally consulted with the U.S. Fish and Wildlife Service on the question of whether its actions are affecting the aquifer-dependent species, despite a requirement in the Endangered Species Act to do so.

Nor has any other federal agency. Yet scores of agencies are involved in activities that merit such review, according to the wildlife service. Some examples:

■ The Defense Department, which pumps water from the Edwards to slake thirsts and irrigate golf courses at nearby military bases.

■ The Agriculture Department, which funds a myriad of financial aid programs for farmers and ranchers who use Edwards water.

■ The Transportation Department. See Agencies, B4

B4 Austin American-Statesman

Friday, July 15, 1994

This section is recyclable ♻

Agencies briefed on aquifer rules

Continued from B1
ment, which spends millions of dollars on highway construction that pollutes the aquifer and attracts water-consuming development such as homes and businesses.

The situation might be about to change. On Thursday, representatives of dozens of federal agencies came to Austin for a primer on their duties under the Endangered Species Act. The Fish and Wildlife Service, which organized the meeting, didn't pull any punches:

"It's time to ensure that the federal house is in order regarding this matter," said Sam Hamilton, the wildlife service's state administrator.

One reason for the increased concern is that no rules govern pumping from the southern Edwards Aquifer, a 175-mile-long conduit covering about 3,600 square miles. The aquifer extends south and west from Hays County through San Antonio and into Uvalde and Medina counties. The Barton Springs segment of the Edwards Aquifer, which is hydrologically separate, covers portions of Hays and Travis counties and feeds Barton Springs Pool in Austin's Zilker Park.

Last year, the state Legislature passed a bill establishing an authority to regulate pumping, but the measure was set aside by the U.S. Justice Department because it weakened the role of minority citizens by replacing an elected authority with an appointed one. Legislative leaders plan a new effort when they convene next year.

Federal officials at Thursday's meeting reacted much as some private landowners and developers have to the wildlife service's efforts

to enforce the species act.

Some expressed confusion. Others expressed a willingness to cooperate. Still others seemed cool to the interests of the Texas blind salamander, Texas wild rice, the San Marcos salamander, the San Marcos gambusia and the fountain darter.

"We try to be good stewards of our natural resources, and we look forward to being better stewards of our natural resources," said William Bowen, chief of the environmental law and litigation division for the Air Force.

Humberto Garcia Jr., chief of HUD's valuation branch in San Antonio, said he hoped that any new restrictions would not impede economic development and growth in the nation's ninth-largest city.

"Based on the testimony I heard today, maybe the citizens of San Antonio should be declared endangered species," Garcia said.

It was not without some prodding that the wildlife service invited 69 federal agencies to the meeting. Last year, U.S. District Judge Lucius Bunton III of Midland ruled in a case brought by the Sierra Club that the service and its parent agency, the Department of the Interior, had failed to protect the plant and animal species adequately. And last month, Bunton took the first step toward court-ordered rationing by requiring preparation of an emergency plan for dry spells.

The Sierra Club has filed notice of its intention to sue an additional 40 federal agencies for failing to consult with the wildlife service. Under the species act, any federal agency whose actions might affect

an endangered species must consult with the service.

If the wildlife service finds that a proposed action would jeopardize a species' existence, the action is prohibited. However, the agency proposing the action may appeal for an exemption from a special federal panel commonly called the "God squad."

Wildlife service officials explained that it is the responsibility of the other agencies to initiate the consultation process. They suggested that the most efficient way to deal with the Edwards Aquifer might be for several key agencies, including the Defense and Agriculture departments, to form a committee that would prepare a broad assessment of the biological implications of federal activities in the region.

Stuart Henry, a lawyer for the Sierra Club, said he wasn't impressed by the meeting but stopped short of declaring that the club would follow through on its earlier notice and sue. "I was a little surprised at federal agencies' ignorance about how their own programs might affect the Edwards," Henry said.

"I think the Fish and Wildlife Service was doing them a favor. The problem with the federal government is you don't get 'em to make decisions until they have to."

A lawsuit could be a potent tool to compel compliance, Henry said. A federal judge would have the authority to withhold agencies' funding for programs affecting the species.

The wildlife service tentatively scheduled another meeting for Oct. 20.

TEXANS FOR THE ECONOMY AND NATURE

VOTE YES ON PROPOSITION 10



August 6, 1992

Mr. Elden Aldridge
City Clerk
City of Austin
P.O. Box 1088
Austin, TX 78767-1088

RE: Amendment of Specific-Purpose Committee Filing

Dear Mr. Aldridge:

An original amended disclosure report accompanies this letter. The attachment amends the "8th day before an election" report filed by Texans for the Economy and Nature (TEN) on July 31, 1992. The amendment is not substantive in nature. Rather, it corrects several typographical errors and omissions that are detailed below.

- Correction 1. Page 1 of 4 of Part S2 of the original disclosure form listed Mr. Jim A. Smith as contributing \$1,000.00. Mr. Smith's contribution was \$100.00.
- Correction 2. The total in Column 1 of Page 1 of 4 of Part S2 has been changed from \$4,875.00 to \$3,975.00 to reflect the amendment under Correction 1.
- Correction 3. Page 3 of 4 of Part S2 of the original disclosure form listed Mr. Walter B. Kuhl as a contributor but did not indicate a contribution amount in Column 1. Mr. Kuhl's contribution was \$50.00.
- Correction 4. Mr. Robert Foxworth's complete address has been added to Page 3 of 4 of Part S2.
- Correction 5. The total for Column 1 on page 3 of 4 of Part S2 of the original disclosure form has been changed from \$415.00 to \$465.00 to reflect the amendment under Correction 3.
- Correction 6. Page 1 of 2 of Part S6 of the original disclosure form has been revised to explicitly state the purpose of the \$500.00 payment to Tyrone James Fries. Even though Column 2 listed the \$500.00 as a loan repayment, that purpose has been added under the explanation column.
- Correction 7. Page 1 of 1 of Form S8 has been revised to reflect corrections that have been made in other parts of the disclosure form. Specifically, No. 1 under Contributions has been changed from \$6,750.00 to \$5,900.00 and No. 5 under Contributions has been changed from \$75,539.00 (which should have originally been \$72,539.00) to \$71,689.00.

USE ONLY BLACK INK OR BLACK TYPEWRITER
 RIBBON WHEN FILLING OUT THIS FORM

Complete: Pg. 1 of 1

S3

SPECIFIC-PURPOSE COMMITTEE LOANS
 FROM PERSONS OTHER THAN FINANCIAL INSTITUTIONS

Name of committee: Texans for the Economy and Nature (TEN)						
(1) 1. Full name and complete address of person making the loan 2. Full name and complete address of guarantor, guarantor's principal occupation, and name of guarantor's employer (if applicable)	(2) Description of collateral (if any)	(3) Date of loan	(4) Maturity date of loan	(5) Interest rate	(6) Amount of loan	(7) Amount of loan guaranteed by guarantor
Tyrone James Fries 5504 Wagon Train Road Austin, TX 78749	None	7/15/92		0	\$ 500.00	0
Nature Conservancy Action Fund 1815 N. Lynn Street Arlington, VA 22209	Promissory Note	7/24/92	10/31/92	7%	\$ 50,000.00	0
TOTAL						\$50,500.00

See Reverse Side for Instructions

TLS 220003
2/92
Part 5-02

USE ONLY BLACK INK OR BLACK TYPEWRITER
RIBBON WHEN FILLING OUT THIS FORM

Comptrol Pg 3 of 4

S2

SPECIFIC-PURPOSE COMMITTEE
CONTRIBUTIONS OTHER THAN LOANS

Name of committee: Texans for the Economy and Nature (TEN)			
Date	Contributions List full name and complete address of contributor(s)	List the amount of the contribution in the appropriate column	
		(1) Money or Equivalent	(2) Market value and descrip- tion of gifts, use of prop- erty, or services (in-kind contribution)
7/23/92	Len Jordan 1805 W. 46th Austin, TX 78756	\$ 20.00	
7/23/92	The Nature Conservancy of Texas P.O. Box 1440 San Antonio, TX 78295-1440		\$4,489.00 (for direct mail postage)
7/24/92	Walter B. Kuhl 4109 Ave. B, Austin, TX 78751	50.00	
7/25/92	Michael T. Purdy 908 Maufrais, Austin, TX 78703	20.00	
7/25/92	Donald M. Carlson 1355 The High Rd., Austin, TX 78746	250.00	
7/27/92	John F. Davis 22 Carriage House Lane, Austin, TX 78737		\$5,000.00 (for TV commer- cial development)
7/27/92	Robert Foxworth 1230 Benedict Canyon Beverly Hills, CA 90210		\$ 300.00 (for TV commer- cial narration)
7/27/92	Rhea Groepper 3506 Manchaca, Apt. #213 Austin, TX 78704		\$ 500.00 (for logo development)
7/28/92	Melba Davis Whatley P.O. Box 5623, Austin, TX 78763	100.00	
7/29/92	William R. Leon 3636 Bee Caves Rd., Austin, TX 78746	25.00	
TOTAL		\$465.00	\$10,289.00

NOTE: If the committee accepts a contribution from an out-of-state political committee, it must comply with the provisions of section 253.032, Texas Election Code. The provisions of this section are outlined in the instructions on the reverse side.

11592_03.ppt

See Reverse Side for Instructions

1157000
2/92
P.n.5-05

USE ONLY BLACK INK OR BLACK TYPEWRITER

S5

SPECIFIC-PURPOSE COMMITTEE
SUPPORTING OR OPPOSING MEASURES EXCLUSIVELY:
IDENTIFICATION OF CORPORATE OR
LABOR ORGANIZATION CONTRIBUTIONS

Name of committee: Texans for the Economy and Nature (TEN)

Full name and complete address of any corporation or labor organization making a contribution. (See instructions) *Note: Committees supporting or opposing candidates may not accept corporate or labor union contributions*	Date of contribution	Amount of contribution
Del Webb Corporation P.O. Box 29040 Phoenix, AZ 85038	7/16/92	\$ 5,000.00
Sierra Development Corporation 4207 Riverplace Blvd. Austin, TX 78730	7/20/92	1,000.00
Entrecorp 600 Congress Ave., Suite 1630 Austin, TX 78701	7/21/92	500.00
Espey, Huston & Associates, Inc. P.O. Box 519 Austin, TX 78767	7/21/92	1,000.00
Bury & Pittman 3345 Bee Caves Road, Suite 200 Austin, TX 78746	7/22/92	250.00
The Nature Conservancy 1815 N. Lynn Street Arlington, VA 22209	7/22/92	2,000.00
TOTAL		\$9,750.00

TRAVIS CENTRAL APPRAISAL DISTRICT

BOARD OFFICERS

MORRIS SHAPIRO
CHAIRPERSON
KAREN CAMPBELL
VICE CHAIRPERSON
KAREN KRETSCHMAN
SECRETARY/TREASURER



ART CORY
CHIEF APPRAISER

April 18, 1989

BOARD MEMBERS

JETT HANNA
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JAMES KASIER
CATHY VASQUEZ
THEODOR TIMMERMAN
HERMELINDA ZAMARRIPA

Brad Greenblum
Economic Development Commission
301 Congress Avenue
Suite 1200
Austin, Texas 78701

Dear Mr. Greenblum:

In our recent phone conversation you indicated a need for information concerning the effect that the [REDACTED] might have on land values in Travis County. To date, the Travis Central Appraisal District has worked with several people on this issue. Our basic problem is that specific information concerning the affected area is not available, therefore all information has been very general. I have attached my recent correspondence with Bruce Todd on the subject which you requested.

In an attempt to be more specific I have analyzed 1989 acreage values in all the school districts in western Travis Country. Again, this is general because I do not know if these school district boundaries cover more or less of the area affected by the ESO:

<u>School District</u>	<u>Acreage Not Under Ag Use</u>	<u>Market Value</u>	<u>Acreage Under Ag Use</u>	<u>Ag Value</u>
Dripping Springs	457	1,116,000	4,563	203,000
Eanes	14,248	107,800,000	2,832	196,000
Hays	164	503,000	4,619	370,000
Lago Vista	6,192	22,331,000	4,491	207,000
Lake Travis	24,484	81,736,000	34,630	2,945,000
Johnson City	8	18,000	3,251	175,000
Leander	<u>25,554</u>	<u>122,107,000</u>	<u>39,965</u>	<u>15,910,000</u>
TOTALS	71,107	335,611,000	94,351	20,006,000

Brad Greenblum
Page 2
April 18, 1989

Generally, a taxpayer will pay property taxes to all taxing jurisdictions at an average rate of \$2.00 per \$100.00 of valuation. Using that assumption we could analyze tax levy as follows:

AVERAGE PER ACRE	AVERAGE PER ACRE
VALUE OF LAND	VALUE OF LAND
NOT UNDER AG USE	UNDER AG USE
<u>(335,611,000/71,107)</u>	<u>(20,006,000/94,351)</u>
\$4,719 .	\$212

ANNUAL TAX LEVY ON MARKET VALUE OF LAND = \$6,712,000
ANNUAL TAX LEVY ON AG VALUE OF LAND = \$400,000

If all land currently valued at market was affected by the ESO, and if it was valued at the same rate as Ag land is valued (\$212/acre) then the value would be reduced from \$335,611,000 to \$15,075,000.

The annual tax levy to all jurisdictions would then be reduced from \$6,712,000 to \$302,000.

Obviously there are many assumptions in this analysis. The primary assumption being the area affected by the ESO.

Sincerely,


Art Cory
Chief Appraiser

AC/bk

cc: Morris Shapiro

MEMORANDUM

TO: Pacific Communications, Inc. 100 South *Rose*
FROM: Fish and Wildlife Service, OT
SUBJECT: Project Snow Goose - Eastern Marsh Wading
DATE: 3-27-69

Local representatives, and attended a workshop. Local members of the World Regional RCP Biological Advisory Team Meeting, and representatives of ABC's will tentatively plan to manipulate the habitat of a Park Stream in Abaco, to benefit the birds. Assuming a positive conclusion results from discussions of several species imports at the workshop, ABC plans to clear out undesirable vegetation from vireo habitat as an enhancement technique. The area she has picked includes part of a documented, little, breeding territory.

I told Lee that her plan presents a significant public relations dilemma for the Service, since our current interpretation of what constitutes "take" includes clearing woody vegetation in breeding territories.

that she should be allowed to proceed. She says the territory in question is declining and needs to be maintained.

I referred the same, E.C., to George the station.

[illegible]



United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

MAR 30 1994

Margaret Rector
1504 Mohle Drive
Austin, TX 78703

Dear Ms. Rector:

By letter, dated February 11, 1994, you requested a response to three specific questions regarding your property in Travis County and an update on compliance with the Endangered Species Act. Those questions and our response follow.

Is there anything physical that can be done now on my land such as clearing brush, road building, or fencing?

We have not received any new biological information that would alter our position that authorization under the Endangered Species Act would be required for alteration of the habitat on your 15 acres of land. However, we do believe the property could be fenced, if vegetation removal is kept to a minimum and the activity is done outside the breeding season. We also believe that clearing and/or building activities could be accomplished without further authorization in the partially cleared area within 150 feet of Ranch Road 620.

Is a 10(a) permit still required for any construction, and what is the current cost per acre?

A 10(a) permit would be required for construction on the majority of the 15 acres, with the exception of the front 150 feet. We do not have a cost per acre for a 10(a) permit. The City of Austin, in their discussion of a regional 10(a) permit, is still discussing the fees required to participate in their process.

Can I reasonably expect that a substitute for the BCCP be in force within the next 6 months?

I would like to be able to give you a positive answer to this question. However, that depends upon how quickly a plan can be put together that is supported by the local governments and the public who wants to use it. The Fish and Wildlife Service is trying to develop a streamlined process that would be available to small landowners and we are planning to have that available within the next six months. I have your name on our small landowner list and will notify you of the process and request your input on how that would affect your property.

I apologize for this delayed response. If you have any additional questions, please call me at (512) 482-5436.

Sincerely,

Joseph E. Phelan
H.T. 2 Field Supervisor



United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701



PR 07 1994

This letter is in reference to recent clearing activities on your property on FM 1340 near Hunt, in Kerr County, Texas. This property supports vegetation that is possibly occupied by the federally listed endangered golden-cheeked warbler. According to our files, golden-cheeked warblers have been sighted on adjacent properties in similar habitat, and are possibly present on your property close to the area that has been bulldozed.

If the activities taking place on the subject site disrupt the breeding and/or foraging activities of the federally protected golden-cheeked warbler, these activities would constitute a "take" of listed species. Take of listed species is prohibited under section 9 of the Endangered Species Act (Act) and must be avoided or authorized under section 7 or section 10 of the Act.

The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct. "Incidental taking", authorized under section 7 or 10 of the Act, means any taking otherwise prohibited, if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

Based on aerial photographs, and other information available to this office, we recommend that clearing activities on the property be discontinued and a biological survey be performed by qualified biologists to determine if this habitat is currently being utilized by golden-cheeked warblers. This would help you, and our office, determine if further development of this site would require authorization under the Act. Please see the enclosure for minimal survey requirements for the golden-cheeked warbler.

If you have further questions regarding the ecology of the golden-cheeked warbler, or the Act, please contact Bob Simpson of my staff at (512) 482-5436.

Sincerely,

Joseph C. Blunt
Acting Field Supervisor



United States Department of the Interior

FISH AND WILDLIFE SERVICE

611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

NOV 19 1992

Austin, Texas

Dear Mr. [REDACTED]

This responds to your letter, dated [REDACTED] 1992, and follow-up letter, dated [REDACTED] 1992, pertaining to several lots in [REDACTED]

[REDACTED] Travis County, Texas. We previously reviewed all but one of these lots [REDACTED] in separate letters pertaining to each subdivision, dated [REDACTED] 1991, [REDACTED]

You requested that we reevaluate our determination that, due to the potential for adverse impacts to the golden-cheeked warbler, development of these lots could require authorization under Section 7 or 10 of the Endangered Species Act (Act). Regarding lots [REDACTED] you asked that we reconsider our recommendation that development of these lots be restricted to the upland areas and exterior construction activities not occur between March 1 and August 1.

On [REDACTED] 1992, we met with [REDACTED] at our office to discuss the proposed development. We informed you [REDACTED] that, based on the 1991 and 1992 survey results and presence of suitable warbler habitat throughout both properties, our determination as stated in our [REDACTED] 1991 letters remains unchanged. Upon your client's request, we agreed to conduct an on-site inspection of the vegetation on each lot. On [REDACTED] four of our staff biologists visited the properties to determine if any of the lots are unsuitable for warbler occupation and if development of any of the lots could proceed without impacting the warbler.

Based on 1991 and 1992 survey results, available information, aerial photographs, and our [REDACTED] site visit, we still believe development of all lots addressed in this letter, [REDACTED] would adversely impact the warbler. Our biologists observed a woodland community of oaks and juniper consistent with the Service's legal definition of warbler habitat on all of these lots. As shown on aerial photographs, this habitat is contiguous with a large block of habitat known to be occupied by the warbler, and each lot is within at least 2000 feet of a warbler sighting. Development of these lots would further reduce and fragment the remaining warbler habitat, and could result in increased secondary impacts, causing territory abandonment or reduced reproductive success. Possible secondary impacts include, but are not limited to, increased numbers of potential predators (e.g., raccoons, house cats, jays, etc.), increased noise levels and human activity in warbler habitat areas, and concurrent changes in existing plant and animal communities on which the warbler depends.

As is evident from the 1991 and 1992 survey results, warbler occupation in a given habitat patch may vary from year to year. Given this fact and the limitations of human observers, we believe that if warblers are present in a

Mr. [REDACTED]

Page 2

patch of contiguous habitat, then any portion of that patch could be occupied. Thus, our current position regarding the location of proposed developments is based on the configuration of the habitat patch as well as locations of warbler sightings.

In your [REDACTED] letter, you refer to a 300-foot buffer zone between development and occupied warbler habitat that has been recommended by the Service. As a point of clarification, this distance is used to establish time constraints on external construction activities in non-warbler habitat. We have previously recommended that external construction activities in non-warbler habitat areas not occur within a minimum of 300 feet from the edge of warbler habitat or a warbler territory during the period when the warbler is resident in the area (March 1-August 1), in order to avoid harassing any warblers that may occur near the development.

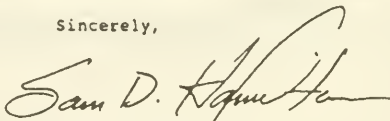
During our [REDACTED] site visit, we observed that vegetation in [REDACTED] is being cleared. This area constitutes suitable warbler habitat, and our records show that one to two warblers were sighted on and adjacent to [REDACTED] by DLS Associates in 1991. Warblers were also sighted just east of [REDACTED] across from [REDACTED] in 1991 and 1992. Thus, as we have already stated, we believe such activities require authorization under Section 7 or 10 of the Act.

We reiterate that the position stated in our [REDACTED] 1991 letters remains unchanged, and that we believe development of all of the lots addressed in this letter [REDACTED] requires authorization under Section 7 or 10 of the Act. To avoid removing any warbler habitat, we also concur with our previous determination that development of [REDACTED] should be restricted to the upland areas. If the external construction activities on [REDACTED] are greater than 300 feet from the edge of warbler habitat, then development of these lots may proceed during the March 1 - August 1 period.

The recommendations in this letter are based upon current knowledge of the warbler, and are what the Service believes are necessary to comply with the Act under current conditions. Should any biological information become available that clearly demonstrates the proposed developments would pose no threat to the warbler, the Service's recommendations may change.

Thank you for providing pertinent information for this review. We apologize for our delayed response and any inconvenience this may have caused you and your client. If we can be of further assistance, please contact Lisa O'Donnell or Jana Grote at 512-482-5436.

Sincerely,



Sam D. Hamilton
State Administrator

cc: City of Austin, Environmental and Conservation Services Department, Austin, TX
Jim Nuckles, Travis County Tax Appraisal District, Austin, TX
Special Agent, FWS, Division of Law Enforcement, San Antonio, TX

IN REPLY REFER TO:



UNITED STATES
DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE

Ecological Services

Stadium Centre Building

711 Stadium Drive East, Suite 252

Arlington, Texas 76011

February 20, 1991

Mrs. MARGARET S. RODGERS
Nps. Margaret S. Rodgers
Rt. 8, Box 311
Lago Vista, TX 78645

Dear Mrs. Rodgers:

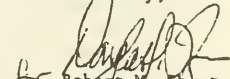
It has come to our attention that clearing of a strip of woodland has recently occurred on a tract of land located south of FM 1431 in the vicinity of Lago Vista, Texas. We understand that you are one of the joint owners of the property. Information available to us indicates that this property supports prime habitat for the federally-listed endangered golden-cheeked warbler. Destruction of habitat of an endangered species may constitute a "take" of that species as defined by the Endangered Species Act, which prohibits "take" of a federally-listed species unless the "take" is incidental to otherwise lawful activity and a permit in compliance with the Act has been obtained. In this case, a permit under Section 10(a) of the Act would apply. Information on the Section 10(a) permit process is enclosed.

Destruction of endangered species habitat, without a permit, that results in "take" of a federally-listed endangered species could be held to be a violation of the Act and could expose a violator to the criminal penalties provided for under Section 11(b)(1) of the Act or to the civil penalties provided for under Section 11(a)(1) of the Act. Section 11(b)(1) provides for a fine of not more than \$50,000 or imprisonment up to one year, or both. Section 11(a)(1) permits assessment of up to \$25,000 as a civil penalty for each violation.

This matter is currently under investigation by Special Agent Alex Hasychak of the Fish and Wildlife Service Law Enforcement Office in San Antonio and by personnel of this office. If you are indeed an owner of the property in question, we respectfully urge that you cease any further land clearing

activities and contact Alex Hasychak at (512) 229-5412 or Joe Johnaton of this office at (817) 885-7830 for additional information on compliance of such activities with the Endangered Species Act.

Sincerely,


for Robert M. Short
Field Supervisor

Enclosure

cc: Law Enforcement, FWS, San Antonio, TX
Regional Director, FWS, Albuquerque, NM (FWE/HC)
Regional Solicitor, USDI, Tulsa, OK

SUMMARY OF CASE STUDIES

The three case studies, which have been previously discussed dramatize and highlight the haphazard and exclusive behavior of USFWS in the listing process for species which are potential candidates for endangered status. The first case study (invertebrates in Austin, Texas) demonstrates that when species are listed on opinions based on little or no data, USFWS will not respond to data which runs contrary to these opinions. The second case study (invertebrates in San Antonio, Texas) demonstrates the exclusiveness with which USFWS gathers data on endangered species. The third case study (the golden-cheeked warbler in Central Texas) demonstrates that when USFWS contractors provide information which is contrary to USFWS opinion, that information may not be released to the public.

The consequences of this haphazard and exclusive process is that when the species are listed on opinions with little or no supporting data, then it is almost impossible to demonstrate that a particular activity will not cause significant adverse impacts regardless of how much data you gather to the contrary. Further, this behavior breeds significant mistrust of USFWS by the landowning community which can eventually turn the public against the concept of protecting endangered species.

The nine species are:

Cicurina baronia is known only from Robber Baron Cave in an urbanized area of San Antonio, along and partly under Nacogdoches Road and Camellia Road, south of 410 and east of Hwy 281, in the Austin Chalk formation. The cave has historically been a commercial cave. Access is limited and the entrance is gated. Entry is controlled by the Bexar Grotto of the National Speleological Society.

Cicurina madla is known only from Madla's Cave, north of Helotes. The only recorded collection of this species was made on 4 October 1963, although *Cicurina* spiders were recorded as observed in 1993. The cave has access restricted by the owners.

Cicurina venii is known only from Braken Bat Cave, north of FM 1957 and west of Loop 1604. The cave is in a small clump of oaks in a manicured lawn next to a house.

Cicurina vespera is known only from Government Canyon Bat Cave, 5 miles southwest of Helotes. This has been targeted for acquisition by Texas Parks and Wildlife Department.

Neoleptoneta microps is another spider, also found only in Government Canyon Bat Cave. This is a small eyeless spider, 1.7 mm long, yellowish in color, that spends its life hanging in a small tangled web. It was collected once, in 1965.

Texella cokendolpheri is a harvestman (a daddy long legs, but with fairly short legs), eyeless and pale orange in color, approximately 1.5 mm long. Harvestmen are predators or scavengers on other invertebrates, and cave harvestmen probably eat springtails (tiny insects that eat fungus). This species has been collected at Robber Baron Cave and tentatively identified from a juvenile specimen collected at John Wagner Ranch Cave No. 3 (Helotes Area).

Rhadine exilis is a small beetle, known from 4 sites at the time of the petition for listing. Those sites are: John Wagner Ranch Cave #3, Unnamed Cave 0.8 N Helotes, Headquarters Cave on Camp Bullis, and Black Cat Cave.

Rhadine infernalis has two subspecies, *infernalis* which is known from Madla's Cave and John Wagner Ranch Cave #3 and *ewersi*, known only from Headquarters Cave. Specimens that could not be identified to subspecies, described as "hybrids", were found in at least 7 other caves: Cave of the Woods, Genesis Cave, Helotes Blowhole, Isopit, Kamikazee Cricket Cave, Poison Ivy Pit, and Wurzbach Bat Cave.

Barrisodes venyivi is only from Helotes Hilltop Cave. It is a small beetle about which essentially nothing is known. Only one specimen has ever been collected, in 1984. It was found on the underside of a rock partly buried in soil.

RECOMMENDATIONS

Serious problems exist in the listing process. While many at risk species which may, in fact, meet the criteria for endangered status, the process is so flawed that it is in many cases difficult to make this determination. The following are suggestions which could provide for a more open and objective process:

1. Promulgate minimum standards and criteria for the preparation and analysis of "best scientific and commercial data available." Standards establishing the required expertise of the researcher who prepares best available data should also be established;
2. Formalize a peer review process for reviewing the best available data. Establish appropriate professional standards for participating on the committee, and the committee should include private sector scientists;
3. Publish the results of peer review in the Federal Register along with the listing;
4. Create a process to provide notification to landowners of any changes in the species status; and,
5. Create a process which establishes a cooperative arrangement with landowners for the protection of at risk species. This process should include keeping landowners informed of any potential study which may occur within the range of the species and has the potential to affect their property.

STATEMENT
OF
WILMA ANDERSON, EXECUTIVE DIRECTOR
TEXAS SHRIMP ASSOCIATION
BEFORE
THE ENDANGERED SPECIES ACT TASK FORCE
OF THE
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

March 20, 1995
Field Hearings in Boerne, Texas

Mr. Chairman and Members of the Task Force:

My name is Wilma Anderson and I am the Executive Director of the Texas Shrimp Association ("TSA"), a trade association representing the interests of shrimp vessel owners operating in waters along the coast of Texas, Louisiana, Mississippi, Alabama and Florida West Coast and in the Gulf of Mexico. TSA's 330 members own over 700 shrimp vessels and many of our members also own shoreside shrimping support facilities. TSA associate members include processors, packing houses, wholesalers, distributors, retailers, transportation companies, and lending institutions.

I have been TSA's Executive Director since 1991 and served as a director of the Association for several years. I also own and operate three offshore shrimp vessels. Since 1987, a great deal of my time has been devoted to the constraints and restrictions placed on shrimp fishermen to protect five species of sea turtles listed as threatened or endangered under the Endangered Species Act (the

"ESA").^{1/} Our Association believes that our industry is at a regulatory cross-roads and hopes that this Task Force can find ways to protect sea turtles without placing nearly the entire responsibility and cost on the hundreds of small businesses that make up the shrimp industry in the Gulf of Mexico.

In my testimony today, I want (1) to provide a brief history of the conflict between shrimp fishing and the ESA for this new Congressional Task Force; (2) to report on recent developments in the shrimp/turtle controversy, especially the prospects for greatly expanded regulation of the shrimp industry because of the apparent success in protecting turtle populations; (3) to share with you the concerns of TSA members about the manner in which the National Marine Fisheries Service ("NMFS") has reacted to last year's increased strandings of turtles; and (4) to recommend some suggestions about how regulatory and legislative policies could be changed to help our industry.

Brief History of the Shrimp/Turtle Controversy

Ever since NMFS, a part of the U.S. Department of Commerce, determined that a primary cause of mortality to listed sea turtles is shrimp trawling, the commercial fishing industry in the Gulf of

^{1/} The listed species of sea turtles found in the United States marine waters of the Gulf of Mexico are: (1) threatened species--loggerheads and green turtles (except in Florida); and (2) endangered--Kemp's ridleys, leatherbacks, hawksbills, and green turtles in Florida. 50 C.F.R. Sec. 17.11. Critical habitat has been designated only leatherback turtles found in the U.S. Virgin Islands (50 C.F.R. Sec. 226.71).

Mexico and the South Atlantic 2/ has been subjected to ever-increasing federal regulation and enforcement of those regulations. The agency's decision 3/ led to a final regulation, effective as of December 4, 1992, requiring that all shrimp fishing vessels operating offshore must be equipped with and use in very net a turtle excluder device (commonly called a "TED".4/ It is well known to this Task Force, I am sure, that the TED regulations led to numerous legal challenges,5/ federal legislation delaying the enforcement of those regulations, and blockades by shrimp fishermen in several Gulf ports, placing them among the most controversial ESA regulations ever issued.

As a consequence of NMFS' regulations, the shrimp industry, particularly in the Gulf of Mexico, has become one of the most intensely regulated business activities in the United States.

2/ In 1992, NMFS estimated that the Gulf of Mexico shrimp fleet was comprised of 5,400 vessels that fished "offshore" or outside the COLREG demarcation line and over 10,000 vessels that fish "inshore" of that line. In recent years, the size of the offshore shrimp fleet in the Gulf has declined by about 2,500 vessels.

3/ This determination was also supported in part by a report from the National Research Council entitled Decline of Sea Turtles: Causes and Prevention (1990). TSA believes that this report is now out of date and no longer represents the best available scientific information on this subject.

4/ These protective regulations were issued under section 4 (d) of the ESA (16 U.S.C. Sec. 1533(d)) and are found in 50 C.F.R. Sec. 227.72. The TED requirement did not apply to shrimping in "inshore" areas, i.e. bays, internal waters, etc., until late in 1994.

5/ The TED regulations were challenged in court by the State of Louisiana and upheld on the basis of then available scientific information. State of La. ex rel. Guste v. Verity, 853 F. 2d 322 (5th Cir. 1988).

And we have been constantly told that, under the ESA, protecting sea turtles is more important than the economic well-being of thousands of small businesses engaged in this country's largest and most valuable segment of the fishing industry. Furthermore, now that turtle populations are beginning to rebound 6/ thereby increasing the possibility of even greater mortality to these species by all activities, only the shrimp industry faces the prospect of even more restrictive regulations. Ironically, along with greater success in protecting turtles will come more and more pressure to restrict shrimp fishing. We see little escape from the expanding spiral of regulations created by the ESA. Mr. Chairman, it is fair to say that the ESA offers no real positive incentive to shrimp fishermen to protect turtles. That law only promises shrimpers more and more government regulation and law enforcement, even if other activities are causing harm to turtle populations and even if turtle populations recover.

Since the TEDs regulations went into effect,7/ the federal government has focused its ESA efforts on enforcing the regulations

6/ See the attached article from the New York Times, November 29, 1994: "Endangered Ridley Turtle Makes a Comeback on Mexican Coast." ATTACHMENT 1. Scientific consultants to TSA confirm that we are seeing greater numbers of listed species of turtles in Texas waters than we have in many years.

7/ In connection with adopting these regulations, NMFS also issued a biological opinion that found that jeopardy to listed species of sea turtles would not result from shrimp fishing if fishing is conducted in compliance with the new sea turtle conservation regulations. The biological opinion also included an incidental take statement authorizing the incidental taking of a small number of sea turtles in shrimp fishing operations.

against shrimp fishermen, almost to the exclusion of all other possible causes of turtle mortality. There are five different TED devices that have been approved by NMFS, although only one was developed by the government, which is a square shaped metal device that catches the turtle on an angled grid-like surface that "shoots" the turtle out of the net through a flap at the top. The industry rejected this device, it was too cumbersome and had excessive shrimp loss. Some TEDs are made of soft webbing and have the turtle escape openings at the top of the net and some TEDs are hard-grid and have the turtle escape openings at the bottom of the net, although all operate on the same principle. Shrimp fishermen must have one of these certified devices properly installed in each net on board a shrimp vessel. Failure to have a properly installed TED device will subject the owner and operator of the vessel to a fine of up to \$25,000 for each violation and to forfeiture of any shrimp catch on board when a violation is detected.^{8/} Criminal penalties are also available to the government, and criminal penalties have been imposed on the industry.

We know that use of TEDs causes significant shrimp loss, reducing our catch of shrimp by perhaps 30 percent on the average. The government claims that the shrimp loss is not significant. We

^{8/} Unfortunately, the government has yet to develop a standardized definition of what is "proper" installation of the several authorized TED devices. Consequently, each enforcement officer has their own views of what is "proper." Only recently has NMFS agreed to work with the industry to develop a TED Installation Manual as to the proper way to install a TED according to NMFS certification in a shrimp net.

also believe that shrimp vessels that fish in deeper waters, e.g. in water beyond 6 miles from shore (5 to 7 fathoms in depth), should not be required to use TEDs because of the low probability of ever catching a turtle. Even the National Research Council Report concluded that "[r]estrictions should be relaxed where turtles are and historically have been "rare." Yet NMFS appears unwilling to consider relaxing the TEDs requirement with applies uniformly throughout the Gulf of Mexico and South Atlantic waters.

Finally, shrimp fishermen believe they have been unfairly spotlighted as the sole contributing cause of turtle strandings^{9/} on Gulf of Mexico beaches. Other causes of sea turtle deaths are routinely discounted by NMFS, although other activities such as rig removal, seismic activity, other commercial fisheries, dredging and recreational fishing are contributors to these strandings. Just this month, upon evidence obtained by TSA, NMFS agreed that strandings earlier this year in South Texas were caused by dredging operations in the Brazos-Santiago Pass, the first time that the agency has accepted that causes other than shrimping are responsible for turtle strandings in the Gulf of Mexico. Moreover, the Texas Parks and Wildlife Department reports significant numbers of Mexican illegal high-speed gillnet fishing vessels operating in South Texas waters. We believe these illegal fishing activities

^{9/} Turtle carcasses wash up on beaches and are investigated by a loose stranding network that gathers data on the dead turtles. However, the agency has found it difficult to conclude from these strandings the exact time, cause and location of death of the stranded turtles. Most are assumed to be caused by shrimping but the evidence is not definitive.

are also catching turtles that winter in the area. We do not believe NMFS has paid sufficient attention to these sources of turtle mortality.

Increased Turtle Strandings in 1994

Last year, dead turtles began washing ashore in the Gulf of Mexico in numbers larger than was the case in previous years when TEDs were not used or even required. According to NMFS, a total of 366 turtles stranded on Texas offshore beaches between January and August, 1994 and 164 turtles in Louisiana between January and September 1994. As a consequence of these strandings, NMFS initiated consultations required under section 7 of the ESA to determine if any activity regulated by the federal government might be causing jeopardy to the listed species of turtles.^{10/}

In a biological opinion issued by NMFS on June 28, 1994, the agency concluded that the increased strandings "may be due, in part, to the inability of bottom-opening, single grid turtle excluder devices (TEDs) without floats to properly release turtles." On June 29, 1994, the agency promulgated a new "interim final" rule requiring shrimp fishermen to attach floatation devices to single grid TEDs with bottom escape openings.^{11/} In the public notice that accompanied these new regulations, NMFS stated that

^{10/} Under the ESA, NMFS is both the protective agency and the action or regulatory agency. In essence, NMFS consults with itself. In contrast, in the spotted owl situation, the U.S. Fish and Wildlife Service consults with the federal agencies responsible for managing public forest (e.g. the Forest Service).

^{11/} 59 Fed. Reg. 33447.51.

"[t]he exact cause of the strandings has not been precisely determined."

On September 13, 1994, Earth Island Institute filed suit in Federal District Court in Washington, D.C. seeking to enjoin "any further shrimping that may lead to the further unlawful take of endangered sea turtles." TSA, along with the National Fisheries Institute, intervened in that lawsuit to protect the interests of the shrimp industry. In early October, another lawsuit seeking similar relief was filed in Federal District Court in Galveston, Texas by the Center for Marine Conservation.^{12/} We also intervened in that lawsuit. Just recently, Earth Island Institute voluntarily dismissed its suit. Discussions are underway to settle the other case.

Contrary to the allegations of the environmental groups in these suits, NMFS had not completed its analysis of the strandings and had, in fact, continued the consultations under section 7. On November 14, 1994, the agency issued another biological opinion that contained a number of new actions suggested as a "reasonable and prudent alternative" to the prior regulations that the agency

^{12/} We understand that the reason that two groups filed two different suits in two different courts was because of internecine competition between the two environmental groups to take credit for protecting turtles in fund-raising mailers. We believe this behavior leads to a misuse of the judicial process and unnecessary cost to the government and industry.

^{13/} The November 14, 1994 biological opinion is attached as ATTACHMENT 2 to this testimony.

said avoid jeopardy to sea turtles in the future. This alternative constitutes a fairly dramatic new regulatory program aimed at the shrimp fleet.

The major conclusions of NMFS' biological opinion were as follows:

Because the very high level of mortality of an endangered species like the Kemp's ridley threatens its continued existence, NMFS has determined that shrimping in the nearshore waters of Texas is likely to jeopardize the Kemp's ridley sea turtle.

The major apparent cause of the strandings is the incorrect installation and improper use of TEDs by shrimpers in the Gulf of Mexico. Other causes include: 1) Certification TEDs which are ineffective due to their complexity or incompatibility with net types; and 2) intensive "pulse" fishing in areas of high sea turtle abundance during spring and summer 1994.

The biological opinion called for an expanded enforcement and regulatory program to prevent further strandings, all focused on the shrimp industry. The centerpiece of the regulatory system remains the TED, with respect to which the agency stated in the biological opinion: ".... while most shrimp trawlers were equipped with TEDs, many were installed improperly." The elements of the new regulatory program are the following:

1. High levels of enforcement with the ability to increase

enforcement of the existing TED regulations if strandings increase, and expanded observer coverage on shrimp vessels.

2. A new vessel registration system, to be used to sanction shrimpers for "egregious or multiple" violations and gather data.

3. Possible decertification of some types of TEDs that now have NMFS approval, in particular the soft TEDs and possible hard-grid bottom shooting TEDs.

4. An Emergency Response Plan that could include any of several severe new restrictions on shrimping: prohibitions on nighttime shrimping, restrictions on the number and size of trawl nets, restrictions on the size of trynets, authorization of only top-shooting hard-grid TEDs, or area closures.

5. Creation of a new special sea turtle management areas within which many of the same restrictions used in the emergency plan would apply.

Also included in the biological opinion is an incidental take statement which would allow the entire shrimp fishing fleet in the Gulf of Mexico and the South Atlantic to take only 4 hawksbills, 4 leatherbacks, 4 greens, 8 Kemp's ridleys, and 20 loggerheads. Consequently, law-abiding shrimpers face the possibility of having all shrimping curtailed if a few turtles were killed within such an expansive area (North Carolina to Texas).

TSA's Views on the New Biological Opinion

A biological opinion, we are told, does not have the force of law under the ESA; it only contains strong suggestions about how to avoid jeopardy to the listed species. This new biological opinion,

however, is similar to have the agency develop a whole new set of protective regulations for turtles after discussing these new restrictions only within itself, without regard to the public rulemaking requirements of the Administrative Procedures Act ("APA"). The biological opinion was not even published in the Federal Register or circulated widely among the public before the agency adopted it. Most shrimp fishermen, I am certain, do not know today exactly what is in the opinion or what it means for them.

We have major concerns about the biological opinion. Our first concern is the nearly secret manner in which it was developed. We have been pressing NMFS to publish immediately all those aspects of the biological opinion that are subject to rulemaking under the APA, including the elements of the Emergency Response Plan. Unfortunately, no draft regulations have been issued to date. We strongly believe that all those elements of the new biological opinion that are restrictions on shrimp fishing should be subject to the public rulemaking process. Moreover, we do not believe that all the measures identified by NMFS in the biological opinion are necessary or will be effective in preventing jeopardy to listed species.

Second, we continue to be concerned about NMFS and Coast Guard enforcement that involves repeated inspections of shrimp vessels and citations for every possible technical violation of federal regulations. As pointed out earlier, there is no installation manual about how a certified TED is to be properly installed in a

trawl according to NMFS standards. Consequently, each inspecting official may have a different view as to what is proper and citations are issued. We believe that shrimping in offshore waters rarely encounters turtles, our biggest concern is being cited for a minor technically and our shrimp seized for failing to meet the government's regulations. In short, all the expense and trouble of expanded enforcement and civil penalties may not be saving any turtles, but will only increase our industry's aggravation and costs.

Third, we are strongly opposed to a new vessel registration system. We question how such a system is related at all to turtle protection that would avoid jeopardy to sea turtles. What such a system means to fishermen, however, is more paperwork, more fees to be paid from an already stressed cash flow, and more regulations to learn and comply with. We already have vessel registration documentation from the Coast Guard and vessel registration fishing permits from the states in which we operate. We are certain that this Congress will not support funding for a whole new vessel registration permit system, as a protection measure, that is inconsequential to saving turtles.

Fourth, the biological opinion appears to favor the government-developed hard TED over all others. If the other TEDs are decertified, then many shrimp fishermen will have to invest even more money in converting to the fewer TEDs allowed by NMFS. We see no thought being given to providing fishermen financial help to comply with the government's change of mind on allowable TEDs,

nor compensation for the current TEDs that would have to be removed from the nets.

Fifth, we believe that the government has not properly analyzed the available data and, therefore, the existing regulatory program is not directed to solving the problems of turtle "hot-spots" and other mortality. In particular, our scientific consultant has found that the Kemp's ridley turtles are being found in increasing numbers; that the turtles are common in inshore areas where shrimp fishing effort is most intense but TEDs were not required until late in 1994; that the prevailing oceanographic conditions indicate that many of the strandings in Texas were likely not attributable to offshore fishing in Texas but were coming from the inshore bay areas and nearshore areas in Texas and Louisiana; and that the governments evidence supports the finding that few turtles are encountered outside 6 miles (5 fathoms to 7 fathoms) offshore the mainland.^{14/}

The agency's apparent conclusion that the major cause of the 1994 strandings is either illegal activity or improper installation of TEDs by those vessels fishing offshore is simply not supported by the data. The agency also said there was a "clear relationship between increased enforcement efforts and reduced turtle mortality." However, our consultant found that, in 1990, there was nearly an identical time and effort relationship to 1994 with

^{14/} ATTACHMENT 3 is evidence of how few turtles were caught in NMFS' research tows. The solid dots show captures of turtles in B) and C).

respect to shrimping and turtle strandings but that year no enforcement actually took place. The enforcement pattern of 1994 simply cannot explain the nearly identical pattern of strandings and shrimping effort in 1990. Consequently, we believe it unlikely that a single year's data on enforcement activity can explain why turtle strandings go up or down. The government is jumping to conclusions too quickly here.

Finally, TSA is prepared to play a much stronger role in shaping the actions the government takes to control our businesses and our way of life under the ESA. We are prepared to recommend, in the context of an open-minded public rulemaking by NMFS (which would include a peer-review workshop), changes to the existing regulatory system that would redirect shrimp effort away from the inshore and nearshore areas where turtles concentrate and allow shrimping in waters deeper than 5 to 7 fathoms to be conducted without TEDs. We want a more open process for reviewing NMFS' regulatory actions. We also want the agency to focus more on other causes of turtle mortality, including dredging, illegal fishing by Mexican vessels in South Texas, removal of offshore oil/gas platforms, seismograph activity, other commercial fisheries, recreational fishing and protection of the turtle habitat within the ecosystems from pollution. Everyone should bear their fair share of the burden of protecting listed sea turtles, not just shrimp fishermen. And we want to find ways to make the entire regulatory system less costly, less intrusive into our business, less complex, and less negative.

The National Research Council Report on Turtles is now five year old. although it is out of date, the report did recommend that NMFS continue to reevaluate the underlying scientific data to make the regulations reflective of new environmental information. The agency has not done so and seems to simply react to events, like last year's strandings, and the pressures of environmental groups. We ask this Task Force to help us obtain real regulatory reform from NMFS.

TSA's Views on Regulatory Reform

We have reviewed briefly the legislation now being considered by Congress to reform the ways the federal government develops and implements regulations. We support proposals to require cost-benefit analyses, risk-assessments, and peer review. We want those principles to apply to implementation of the ESA but are concerned that regulatory impact thresholds of \$50 to \$100 million required to apply these new tools will mean we might not be able to benefit from their use. Perhaps this Task Force will recommend similar legislative provisions to be included in the ESA.

We wish to mention one other matter. Some environmental groups are suggesting that a program be established to promote "Turtle-Safe Shrimp" similar to "Dolphin-Safe Tuna." We hope that Congress and the rest of the shrimp industry strongly opposes this concept. From what I understand, tuna fishermen were never paid more money for "dolphin-safe" tuna--even though environmental groups claimed they would--and the canned tuna market has declined

since the institution of "dolphin-safe" labeling. The U.S. tuna fleet has also declined and in 1992 Congress made tuna purse seining on dolphins a criminal activity despite the incredible strides made by U.S. tuna fishermen to protect dolphins in their fishing operations. This is hardly an example that the shrimp fishermen will consider to follow.

Mr. Chairman, I appreciate the opportunity to present TSA's views to the Task Force. I would be pleased to answer any questions you might have.

Endangered Ridley Turtle Makes A Comeback on Mexican Coast

But gains could be erased by poachers and shrimpers.

By JON R. LUOMA

THE Kemp's ridley turtle, the most imperiled creature of the sea, is appearing to have a glimmer of hope. In the United States, according to scientists, it is on the verge of extinction. But in the Gulf of Mexico, where it is nesting, it is making a comeback.

In recent decades the once-abundant turtle has been reduced to a few hundred nesting females on the Gulf Coast. But now, after an aggressive international conservation effort, the turtle's numbers are beginning to rise.

In the Gulf of Mexico, the turtle is nesting on the coast of Mexico. It is the only place where the turtle is still found in the wild. The turtle is the only sea turtle in the world that is still found in the wild.

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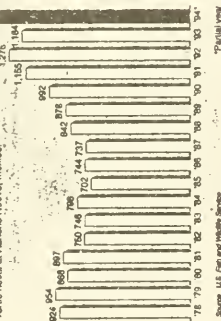
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Nesting Patterns

*Turtle nests at Rancho Nuevo, Mexico.



Source: U.S. Fish and Wildlife Service

Partial year

with the trap doors seem dead, killed hundreds of turtles that might otherwise have survived.

"I'm very hopeful," said Dr. Crouse. "However, I'm also very concerned. The population is still very small, and it might be temporary. In Texas and Louisiana we know of more than 350 nests, but we don't know where they are." Dr. Byles cautions that the turtle population is still very small, and it might be temporary.

Another expert, Dr. Debra Crouse, an environmental group in Washington, agreed that the upward trend in the population is encouraging. But she also cautioned that gains could quickly be wiped out by what she called "poaching and shrimp harvesting." She said that the turtle is the only sea turtle in the world that is still found in the wild.

The devices function as escape hatches for the turtles. The turtles are released from the traps, and the traps are reset. The turtles are released from the traps, and the traps are reset. The turtles are released from the traps, and the traps are reset.

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Richard Byles (white shirt), turtle recovery coordinator, attaching transmitter to turtle at Rancho Nuevo in Tamaulipas, Mexico.

International waters." In the winter months of summer, they have been found up the Atlantic Coast as far as the Gulf of Mexico.

Mexico began a program to try to protect the turtles in 1981, dispatching guards to the beach. But they had limited success. The turtles were being poached, and the poachers were poaching on foot.

In 1978, the Fish and Wildlife Service joined the effort, providing equipment and training for the guards. The guards were poaching on foot, and the poachers were poaching on foot.

The tiny turtles are about the size of a silver dollar. But the relative size of a silver dollar is many as 100 times as large as the turtle's egg. Within 45 minutes, the female turtle will lay a clutch of eggs, and the eggs will hatch in 100 days.

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to dig shallow nests in the soft sand, in which they will lay as many as 100 eggs. Within 45 minutes, the female turtle will lay a clutch of eggs, and the eggs will hatch in 100 days.

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UNITED STATES DEPARTMENT OF COMMERCE
 National Oceanic and Atmospheric Administration
 NATIONAL MARINE FISHERIES SERVICE
 1335 East-West Highway
 Silver Spring, MD 20910
 THE DIRECTOR

NOV 14 1994

MEMORANDUM FOR: The Record

FROM: Rolland A. Schmitt *RS*SUBJECT: Reinitiation of Endangered Species Act Section 7
 Consultation on the Impacts of Shrimp Trawling
 in the Southeastern United States

Based on the attached biological opinion, we conclude that the continued long term operation of the shrimp fishery in the nearshore waters of the southeastern United States is likely to jeopardize the continued existence of the highly endangered Kemp's ridley sea turtle. This Endangered Species Act (ESA) Section 7 consultation on the shrimp fishery was based on a reinitiation of the consultation that resulted in the August 19, 1992 biological opinion on shrimp fishing in the Southeastern U.S. Consultation was reinitiated in response to the unusually high numbers of sea turtle strandings in Texas during the spring and summer of 1994.

Beginning in April, 1994, coinciding with heavy nearshore shrimp trawling activity, unprecedented numbers of dead sea turtles stranded along the coast of Texas. The strandings continued through May and occurred in highest numbers where nearshore shrimp activity was heaviest. Texas waters were closed to shrimp from May 13 through July 7, 1994. During that time, strandings decreased, but resumed when Texas waters reopened. In response, NMFS increased enforcement efforts and technical assistance. Subsequently, strandings again decreased. Finally, when NMFS resumed typical enforcement efforts, high numbers of dead turtles stranded on northern Texas beaches. A total of 366 turtles stranded between January and August, 1994, on Texas offshore beaches, including almost 200 Kemp's ridley turtles. An additional 164 turtles, including 122 Kemp's ridleys, stranded in Louisiana during the period of January through September, 1994. Because the very high level of mortality of an endangered species like the Kemp's ridley threatens its continued existence, NMFS has determined that shrimp in the nearshore waters of Texas is likely to jeopardize the Kemp's ridley sea turtle.

The major apparent cause of the strandings is the incorrect installation and improper use of TEDs by shrimpers in the Gulf of Mexico. Other causes include: 1) Certification of TEDs which



are ineffective due to their complexity or incompatibility with net types; and 2) intensive "pulse" fishing in areas of high sea turtle abundance during spring and summer 1994. The simultaneous occurrence of intensive fishing effort and Kemp's ridley turtles may have led to the repeated submergence of individual sea turtles in short time periods, which could have contributed to the high levels of mortalities.

An attached biological opinion was issued on August 19, 1992, regarding the shrimp fishery and requiring the use of TEDs. It concluded that the shrimp fishery, when conducted in compliance with 1992 Revised Sea Turtle Conservation Regulations and with the Gulf of Mexico and South Atlantic Shrimp Fishery Management Plans, was not likely to jeopardize the continued existence of threatened or endangered species under National Marine Fisheries Service (NMFS) jurisdiction.

This biological opinion identifies a reasonable and prudent alternative to ensure that shrimping does not jeopardize the continued existence of listed species. This alternative requires NMFS to maintain current levels of enforcement for the remainder of the 1994 season and to formulate an emergency response plan detailing NMFS actions to insure shrimper compliance with sea turtle conservation measures. NMFS is additionally required to: (1) Require fishing permits for shrimp trawl vessels operating in the Gulf of Mexico, (2) develop a training program for U.S. Coast Guard boarding parties, (3) amplify domestic TED technology transfer programs, (4) reexamine soft TEDs and the TED approval process, (5) identify special sea turtle management areas and implement appropriate conservation measures, (6) increase beach monitoring for strandings and coordinate activities with the USFWS and Sea Turtle Stranding and Salvage Network, (7) increase observer coverage in the shrimp fishery, (8) form a TED enforcement team to respond to reports of stranding pulses or TED noncompliance, and (9) select a team of experts and population biologists to estimate the current population of Kemp's ridleys and determine the maximum number of individuals that can be taken incidental to commercial fishing. This opinion was formulated using the best available information.

The biological opinion includes an incidental take statement, with reasonable and prudent measures, and terms and conditions. All reasonable and prudent measures in the August 19, 1992 incidental take statement are incorporated into this opinion. The incidental take level identified in this opinion is the documented take (lethal or nonlethal) of eight Kemp's ridley, four green, four hawksbill, four leatherback, or twenty loggerhead turtles for all shrimp trawling activities in the Atlantic and Gulf areas. The incidental take statement also identifies an indicated incidental take level based on weekly stranding rates in each NMFS statistical zone.

Reinitiation of formal consultation is required if: (1) The amount or extent of taking specified in the incidental take statement is exceeded, (2) new information reveals effects of the action that may affect listed species or critical habitat (when designated) in a manner or to an extent not previously considered, e.g., evidence of sea turtle strandings or other observed sea turtle mortality, (3) the identified action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion, or (4) a new species is listed, or critical habitat is designated that may be affected by the identified action. Reinitiation is required within two years of issuance of this opinion in order to reevaluate the opinion and incidental take statement for the shrimp fishery.

Endangered Species Act - Section 7 Consultation

Biological Opinion

Agencies: National Marine Fisheries ServiceActivity: Shrimp Trawling in the Southeastern United States
Under the Sea Turtle Conservation RegulationsConsultation Conducted By: National Marine Fisheries ServiceDate Issued: NOV 14 1994A: Background information

The incidental capture and mortality of sea turtles in shrimp trawls has been the foremost endangered species conflict in the southeastern United States for well over a decade. NMFS has devoted years of effort to resolving this conflict through gear development and regulations. NMFS' efforts culminated in the amendments to the TED regulations (57 FR 57348; December 4, 1992) which require most shrimp trawlers to install an approved TED in each net rigged for fishing year-round in all U.S. waters of the Gulf of Mexico and southern North Atlantic. NMFS believed that these regulations would result in up to a 97 percent reduction in shrimp trawler related mortality to four species of sea turtles. The Endangered Species Act (ESA) Section 7 biological opinion (August 19, 1992) on shrimp fishing pursuant to the final 1992 regulations and the South Atlantic and Gulf of Mexico Shrimp Fishery Management Plans (FMPs) determined that a 97 percent reduction in the mortality of sea turtles due to shrimp trawling would allow the shrimp fishery to continue without jeopardizing the continued existence of listed species of sea turtles.

Sea turtle stranding rates higher than those observed historically have been reported in the northern Gulf of Mexico in 1994. The best available information suggests that many of the observed mortalities have been caused by incidental capture in the shrimp fishery at rates above those considered in previous consultations. Consultation has therefore been reinitiated on the effects of the southeastern shrimp fishery on listed species of sea turtles.

1. 1993 Mass. Stranding of Kemp's ridleys in Louisiana

During Memorial Day weekend of 1993 over 100 small Kemp's ridley turtles stranded along the shore of Grand Isle, Louisiana. The strandings were coincidental with high shrimping effort (over 150 trawlers) off of Grand Isle but enforcement efforts suggested

that TED compliance in the area was good. NMFS received reports from shrimpers that small turtles passed through the bars of the grid TEDs. In November 1993, NMFS tested a variety of TEDs to determine what types and configurations were most likely to retain small turtles. Bottom-opening grid TEDs with floats excluded 7 of 7 turtles introduced into the trawl. Bottom-opening grid TEDs without floats excluded 0 of 7 turtles. Five of the turtles caught passed through the grid bars and the other 2 were unable to escape out the bottom opening.

Single grid TEDs, such as the Georgia and Matagorda, were originally tested for their ability to exclude turtles in the waters off Cape Canaveral, Florida. This area was selected because of the fairly predictable abundance of loggerhead turtles. All single grid TEDs with bottom escape openings were tested with floats. All TEDs are required to meet a release standard statistically comparable to the NMFS TED for each certification test. The NMFS TED has been found to have a 97 percent exclusion rate. The 1987 TED regulations did not dictate that flotation be used, but allowed for floats on all devices. The 1992 revised TED regulations also provided for, but did not require, the use of floats on hard TEDs. During testing it was not anticipated that most grid TEDs would be used without floats, in part because net chaffing would occur from contact with the bottom. In addition, during all certification trials prior to 1993, gear experts did not predict the possibility that the lack of flotation would hinder turtle release.

2. Spring 1994 Sea Turtle Strandings in Texas

Beginning in April 1994, and coinciding with heavy nearshore shrimp trawling activity, unusually high numbers of sea turtles stranded along the coast of Texas (Figure 1). The strandings continued through May and occurred in highest numbers where shrimping activity was the heaviest. Two hundred and sixteen dead turtles, 131 of which were Kemp's ridleys, were found stranded on offshore Texas beaches from April through May 13. An additional 17 turtles were reported from May 13 to May 31 after the Texas closure was implemented. The five-year average (1989-1993) for sea turtle strandings in Texas during April and May was 49.

The Texas strandings were associated with strandings of fish, consisting mostly of sea catfish. The State of Texas documented the presence of toxic dinoflagellates (red tide) in association with the fish and turtle strandings; however, no indication of poisoning was identified in the turtle necropsies or after analyses of collected tissues. Also, there were several menhaden purse seine vessels operating off the Texas coast at the time of the strandings. NMFS observers on the menhaden vessels monitored 29 sets. Observers did not document any sea turtles takes, which

is consistent with historical observations of menhaden purse seine vessels.

Increased dolphin strandings occurred prior to and during the initial period of turtle strandings and fish kills. Ultimately, the cause of the dolphin strandings was determined to be a viral pathogen, morbillivirus, related to canine distemper and measles. While related viruses affect the health of numerous mammal species, there is no information to suggest that turtles could be affected by this mammalian virus. The simultaneous red tide bloom, fish kill, dolphin die-off, and apparent compliance with TED regulations confounded the attempts of NMFS scientists to determine the cause of sea turtle strandings in Texas.

Gulf shrimpers suggested that oil and gas development activities, including explosive platform removals and seismic exploration in the Gulf, may have contributed to the observed strandings. The Corps of Engineers (COE) and Minerals Management Services (MMS) have incorporated conservation measures, including pre- and post-detonation surveys, for their rig removal procedures to minimize the possibility of takes of sea turtles and marine mammals. In over five years of observations, no lethal takes have been documented. Research conducted on air guns, the primary instrument used in seismic surveys, has indicated that while they may be a nuisance to some species, there is no information to suggest that they harm listed species of sea turtles. While conducting aerial surveys to monitor populations of marine mammals in the Gulf of Mexico, NMFS staff have observed seismic vessels operating in the Gulf and have never observed carcasses in the vicinity of the vessels. These activities are being reconsidered, and will be analyzed for any geographic coincidence with strandings, in ongoing consultations with MMS and COE.

In May, gear experts joined law enforcement agents boarding shrimp vessels in Texas and the northern Gulf to determine whether gear problems were contributing to the increased number of strandings. They determined that, while almost all shrimp trawlers were equipped with TEDs, many were installed improperly. For example, several TEDs contained deflector bars that were installed at nearly vertical angles, which could reduce the ability of turtles to exit the net. Current TED regulations require single-grid style TEDs to be installed in the trawl at a 30 to 50 degree angle when the trawl is in a normal horizontal fishing position. An angle greater than 50 degrees will cause clogging of the TED and hinder turtle release. In addition, these and other gear problems with TEDs might not have been apparent to enforcement officers:

Additionally, many of the vessels were using bottom-opening, hard-grid TEDs with insufficient or no flotation attached to the grid. The gear specialists believe that hard-grid TEDs with no, or improper, flotation would cause the grid to drag along the sea

floor pinning the flap covering the escape opening against the net. This situation could severely impair the ability of sea turtles, especially smaller ones, from escaping the trawl net. The unprecedented stranding levels strongly suggested that the shrimp fishery was adversely impacting turtles to an extent not previously considered, therefore consultation on the fishery was reinitiated. The resulting Biological Opinion (June 28, 1994) concluded that proper flotation must be used on single-grid bottom-shooting TEDs to allow the shrimp fishery to continue operating without jeopardizing the continued existence of listed species of sea turtles.

NMFS requested voluntary use of flotation on bottom opening single grid TEDs and requested shrimpers to ensure that their TEDs were installed at proper angles through a press release on June 14, 1994 in anticipation of the flotation rule. NMFS conducted workshops through the Texas Shrimpers Association, and met with shrimpers to discuss the development of rules to reduce the impacts of the fishery on sea turtles. NMFS published an interim rule that requires the use of specified flotation devices on bottom shooting hard-grid TEDs (59 FR 33447, June 29, 1994) to improve their ability to safely exclude sea turtles. At that time, NMFS issued a news release and informed Texas shrimp industry leaders that the float requirement was forthcoming. The rule became effective two days after the Texas closure period ended.

3. Summer 1994 Closure of Texas Waters to Shrimping

As determined under State regulations and the Gulf of Mexico Shrimp Fishery Management Plan, State and Federal waters off Texas, out to 200 miles, are closed to shrimp fishing for 45 to 90 days each year between mid-May and mid-July. In 1994, the Texas closure period extended between May 13 and July 7. Sea turtle strandings on offshore beaches, which had been documented at unprecedented levels of up to 47 turtles each week, declined to levels of one to 16 turtles each week during the closure period. Despite the decrease in strandings, however, approximately four times as many strandings occurred on offshore Texas beaches during the closure period in 1994 as compared to the previous five-year average. Forty-eight sea turtles stranded on offshore beaches during the 1994 closure period. An average of approximately 12 sea turtles stranded during closed periods of similar lengths between 1989 and 1993. No new natural or anthropogenic sources of mortality have been identified to explain the increase in strandings during the Texas closure.

4. Strandings Decreased During Times of Increased Enforcement Efforts

Fifty-six sea turtles strandings were documented between July 10 and July 16, 1994 the week following the July 7, 1994 opening of

Texas waters to shrimping. Enforcement efforts in Texas were intensified in response to the high stranding levels that followed the Texas closure (See Figure 1). From July 18 to July 27, 1994, personnel from the U.S. Coast Guard, Texas Parks and Wildlife combined efforts with NMFS enforcement and gear specialists. Together, they conducted 188 boardings, both at sea and at the dock. Gear problems were observed and corrected by gear specialists on approximately 50 percent of all vessels they boarded. Most of these problems were minor. However, a total of 24 violations were documented, resulting in the issuance of 10 written warnings and 14 referrals to NOAA General Counsel for prosecution. Cases were referred to NOAA General Counsel where gear problems appreciably increased the risk of taking a sea turtle, such as vertical grid angles and inadequate flotation. Stranding levels decreased, and in the two weeks following the initiation of enforcement efforts only 9 and 12 strandings were documented, respectively. Thus, NMFS reduced enforcement efforts.

After high strandings resumed again in the first week of August, a second enforcement operation occurred between August 8 and August 17, 1994. Subsequently, strandings in Texas decreased to one per day or less. Enforcement actions, therefore, appeared to be effective at reducing sea turtle mortalities to background levels. However, it is not clear whether the reduced strandings, after increased enforcement, were due directly to increased compliance and/or due indirectly to dispersal of effort in areas of turtle abundance. Enforcement efforts during this time are described in detail in subsequent sections of this biological opinion.

Coast Guard and enforcement presence in Texas was reduced after the second enforcement action. During the week of August 21 - 27, strandings resumed, as 17 sea turtles stranded in two days between Freeport and Sabine, Texas, for a weekly state total of 23 strandings on offshore beaches. Increased nearshore shrimping effort was observed by sea turtle stranding network personnel during their stranding surveys. Within the cluster of 17 turtles (including at least 7 ridleys) at least four sea turtles were observed with missing appendages that stranding network personnel suggested may have been removed by knife, ax or other cutting or chopping tool. Inspections of two of these turtles by a local veterinarian were inconclusive. In response, NMFS again increased enforcement efforts.

In total, over 366 sea turtle strandings have been reported on offshore Texas beaches between January 1 and August 31, 1994. An average of approximately 109 sea turtle strandings were reported on offshore beaches between January and August over the previous five years (1989-1993). This represents a greater than threefold increase in sea turtle strandings. Most importantly, the number of Kemp's ridleys strandings this year (1994) is nine times higher

than the average number of Kemp's ridley strandings on offshore Texas beaches for that period during the previous five years (22). Loggerhead strandings rates of almost three times the five-year average of 57 have been reported, with 168 offshore loggerhead strandings reported through August 31, 1994.

5. Sea Turtle Strandings in Louisiana

Turtle strandings in Louisiana were also unusually high during the period of January 1 through September 30, 1994. During this eight month period, a total of 122 Kemp's ridleys were reported dead on offshore Louisiana beaches. Recognizing the variability in stranding reporting in Louisiana, this represents a greater than four-fold increase over the five-year average (1989-1993) for the same season. This is the second consecutive year that sea turtle strandings have well exceeded the average level. Additionally, the actual stranding levels in Louisiana are assumed to be higher than reported due to the nature of Louisiana's coastline and the limited and variable scope of systematic stranding surveys in Louisiana.

Data on shrimp fishing effort in nearshore Louisiana waters are not available at this time. Additionally, information regarding coastal gillnet effort, which reportedly occurs in western Louisiana waters, is not available at this time. The population of Kemp's ridleys in the Gulf of Mexico is not limited to Texas waters, and high numbers of Kemp's ridleys occur in Louisiana. Therefore, in considering the impact of the shrimp fishery on the Kemp's ridley population, Louisiana strandings must be considered in conjunction with the Texas strandings.

B. Proposed Activities

This consultation considers the continued operation of the shrimp fishery in the southeastern United States pursuant to the 1992, Revised Sea Turtle Conservation Regulations, and the South Atlantic and Gulf of Mexico FMPs. Shrimp fishery operations were considered in the August 19, 1992 biological opinion and modified by the rule requiring flotation on hard-grid TEDs with bottom escape openings, for which a biological opinion was issued on June 28, 1994.

C. Listed Species and Critical Habitat

The list of endangered and threatened species contained in the August 19, 1992 biological opinion remains unchanged and is incorporated by reference.

D. Assessment of Impacts

The following discussion addresses new information relating to the impacts of the shrimp fishery on primarily Kemp's ridley and loggerhead sea turtles. There is no new information to suggest that hawksbill, leatherback and green sea turtles are adversely affected by the shrimp fishery to an extent or in a manner not already considered in previous biological opinions, including the one of August 19, 1992.

1. Sea Turtle/Shrimp Trawl Interactions in Texas Waters

a. Catch Rates in Texas Waters

Henwood and Stuntz (1987) analyzed shrimp trawler observer data collected from 1974 through 1984 to identify catch rates and estimate total catch of sea turtles in the shrimp fishery. Almost 8,000 hours of shrimping effort were observed in the western Gulf, which corresponds to Texas waters. Sixteen loggerhead takes were observed, representing a catch rate of 0.0020 (+/- 0.0010) loggerheads per net hour. Four Kemp's ridleys were taken, representing 0.0005 (+/- 0.0005) ridleys per net hour. Mortality rates in this area were calculated to be about 38 percent due to the longer than average tow times observed. Mortalities may be higher in areas of densely distributed fishing effort due to the possibility of repeated captures of individual turtles, compounding submergence stresses. Catch rates observed by Henwood and Stuntz (1987) off Texas through 1984 suggest that overall, Kemp's ridleys would constitute approximately 25 percent of all sea turtles lethally taken in shrimp vessels and observed as strandings.

There is no information to determine what percentage of sea turtles lethally taken incidental to shrimp fishing will wash ashore. Takes closer to shore would have a greater chance of beaching prior to decomposition, or ingestion by scavengers.

b. Nearshore Shrimp Trawling Effort in 1994

The primary change in activities in early 1994 which likely contributed to the large number of sea turtle strandings was an increase in nearshore (i.e. within depths of 10 fathoms) shrimping effort before the Texas closure. Intensive nearshore shrimp trawling effort at almost four times the historical (1989-1993) rates were documented off Galveston, Texas in April (NMFS, unpublished data). This high effort increased slightly through May, which is historically a month of high nearshore effort, with effort about 25 percent higher than the 1989 through 1993 average. A strong positive correlation between nearshore shrimping effort and sea turtle strandings prior to the 1994 Texas closure was identified by biologists at the NMFS Galveston

lab, and is consistent with past observations. Caillouet *et al.* (1991) identified a significant correlation between increased strandings and shrimp trawling within 15 fathoms between 1986 and 1989.

Review of preliminary fishery effort data for 1994 suggests nearshore shrimping effort was high in northeastern Texas immediately after the closure ended. Nearly 12,000 hours of nearshore effort off Galveston, Texas was identified during the week following the opening of Texas waters, coinciding with a week of 53 sea turtle strandings on offshore Texas beaches. Continued analyses of fishery effort and distribution data are anticipated, but are not available for this consultation. Fluctuations in nearshore effort corresponding with shrimp distribution likely occurred throughout the remainder of the season, however. During 1994 these pulses of shrimping occurred in areas of high sea turtle concentration. Multiple takes and corresponding repeated forced submergence of individual turtles would likely result in increased mortalities in areas of densely distributed shrimp trawling.

Up to a 97 percent reduction in sea turtle captures, expected with the correct implementation of TEDs, would result in fewer mortalities and fewer shrimp fishery related strandings, but would continue to proportionally represent the resident turtle population unless TEDs were selective by species. During the five years between 1989 and 1993, an average of 22 Kemp's ridleys and 57 loggerheads were reported stranded in the first seven months (January through August) of each year on offshore Texas beaches. However, in 1994, through the end of July, Kemp's ridley strandings on offshore Texas beaches (over 200) outnumbered loggerhead strandings (over 150). Catch rates of Kemp's ridleys appear to be higher than previously observed, and are apparently above rates considered during previous Section 7 consultations conducted on the shrimp fishery.

c. Value of Nearshore Northern Gulf Waters to Kemp's ridleys and Loggerheads

Stomach content analyses on sea turtles stranded in Texas suggest that, in all years, most mortalities occur in nearshore waters. Studies conducted on loggerheads stranded on the lower Texas coast (south of Matagorda Island) have indicated that stranded individuals were feeding in nearshore waters shortly before their death (Plotkin *et al.* 1993). Stomach contents of Kemp's ridleys along the lower Texas coast also showed a predominance of nearshore crabs and mollusks, as well as fish, shrimp and other foods considered to be shrimp fishery discards (Shaver, 1991). Analyses of stomach contents from sea turtles stranded on north Texas beaches apparently suggest similar nearshore foraging behavior (Plotkin, *pers comm*). Over 100 Kemp's ridleys were intentionally live-captured by research gillnets in 1993 at

Sabine Pass by Texas A&M University scientist conducting research for the Corps of Engineers. This illustrates the availability of ridleys to incidental or targeted capture in nearshore north Texas waters.

Ongoing research conducted by NMFS scientists supports the likelihood that the nearshore waters of Texas and Louisiana provide important developmental habitat for young loggerheads and Kemp's ridley sea turtles. Ogren (1988) suggests that the Gulf Coast, from Port Aransas, Texas through Cedar Key, Florida, represents the primary habitat for subadult ridleys in the northern Gulf of Mexico. Preliminary analysis of satellite telemetry data suggests that subadult Kemp's ridleys stay in shallow, warm, nearshore waters in the northern Gulf of Mexico until cooling waters force them offshore or south along the Florida Coast (Renaud, pers comm). Tracked ridleys spent 75 percent of their time in waters less than 5 fathoms deep, and 15 percent in waters between 5 and 10 fathoms.

Satellite transmitters have been applied to approximately 50 adult female Kemp's ridleys over the last decade to identify the movements of the females after leaving the nesting beach in Rancho Nuevo, Mexico (Byles, unpublished data). While most female ridleys head south towards the Bay of Campeche after leaving the beach, 2 out of 8 turtles headed into nearshore Texas waters during one year's study.

Clearly, reproductively active Kemp's ridleys, which are directly required for the recovery of the population, and juveniles are vulnerable to incidental take in Gulf of Mexico shrimp fishery without effective TED use. As a term and condition of the incidental take statement for this biological opinion, NMFS must formulate a research and funding plan to identify high use areas for Kemp's ridleys in the northern Gulf that may require additional management considerations.

d. Results of Necropsies on Stranded Turtles

Seventy-three necropsies have been conducted by NMFS staff on sea turtles stranded on Texas beaches between January 1 and May 31, 1994. Necropsy results did not prove nor foreclose the likelihood that shrimp trawling caused death. Below is a brief summary of necropsy results (Andrea Cannon, NMFS unpublished data):

Sixty-five Kemp's ridleys, four loggerheads, three greens and one leatherback were necropsied. Fifty-three of the Kemp's ridleys had no external injuries. Six ridleys were missing appendages, including at least one shark injury, and one straight edged wound. Six ridleys had propeller cuts. One green turtle also had propeller cuts. There was no way to determine whether these injuries were incurred before or after death.

No material was observed in the gastrointestinal tracts of sixteen ridleys and the leatherback. Two fish hooks were observed in Kemp's ridleys, one of which may have contributed to the mortality. One green turtle contained balloons within its stomach contents. Sand was discovered impacted within the trachea of one ridley. Toxicology tests performed to date have not identified any pathogens. All other turtles examined had food in their digestive tract, indicating they were actively feeding within a few hours prior to death. Eleven ridleys and one loggerhead had been feeding on fish parts, and an additional 20 ridleys and loggerhead had been feeding on both fish and crabs. Fish is not considered to be a normal component of the diet of these benthic foraging species, and is considered to be an indicator of sea turtle foraging on fishery bycatch (Shoop and Ruckdeschel 1982, Plotkin 1993). Turtles may be attracted to areas of heavy shrimp trawling where large amounts of fishery bycatch are thrown overboard. While feeding on dead fish, they may be repeatedly captured by shrimp trawl nets.

e. TED Violations and Enforcement Efforts

Enforcement efforts prior to implementation of the float rule indicated that most shrimpers had TEDs installed in nets. Intensive scrutiny by NMFS gear experts, however, indicated that some of these TEDs were installed improperly in violation of TED requirements. Coast Guard enforcement personnel and NMFS gear specialists collected information during 26 at-sea boardings of shrimp trawlers between May 20, 1994 and June 19, 1994 off Louisiana. Trawlers observed included many of the same vessels that fish off Texas when Texas waters are open to shrimping. No floats were observed on bottom-shooting hard-grid TEDs, which were used on 24 of the vessels boarded. One soft TED and 8 hard TEDs were installed at improper angles.

The float rule was published June 29, 1994, and became effective July 9, 1994, two days after the re-opening of Texas waters to shrimping (July 7, 1994). Fifty-three strandings were reported on offshore Texas beaches during the week following the opening, resulting in an intensive enforcement effort combining NMFS enforcement agents, Coast Guard personnel, NMFS gear specialists and Texas Parks and Wildlife enforcement agents. Warnings about increased enforcement efforts and NMFS policy to include catch seizures for any violation which increased the possibility of a lethal take of sea turtles (eg. vertical angles, no floats) were broadcasted. One hundred and eighty-eight dockside and at-sea boardings were conducted between July 20 and July 26, 1994. A total of 24 violations (13%) were documented, resulting in the issuance of 10 written warnings and 14 referrals to NOAA General Counsel for prosecution. Violations included illegal soft TEDs, TEDs set at steep angles, lack of floats on bottom-grid TEDs, holes in soft TEDs, long flaps over exits, and other gear problems that could result in the incidental capture and

mortality of sea turtles. Additional TED irregularities that did not require enforcement action, and were not likely to lethally take sea turtles, were also observed and corrected. Gear specialists reported that, in 7 days of dockside boardings, approximately 50 percent of the vessels boarded had some type of gear irregularity (Seidel, pers comm). The percentage of violations documented represents the minimum level of violations with the potential to take turtles off Texas prior to intensive enforcement and education efforts in 1994.

Compliance with TED regulations appeared to increase and strandings were reduced immediately following increased enforcement efforts. During the second enforcement operation, between August 8 and August 17, 1994, 272 boardings (97 at sea, and 175 dockside) were conducted. Only 16 violations (6%) were documented, 4 resulting in issuance of written warnings and 12 resulting in referrals to NOAA General Counsel for prosecution. Gear specialists found few TED problems on the vessels that they boarded. Subsequently, strandings in Texas decreased to less than one per day.

Enforcement efforts were relaxed to background levels after August 17, 1994. Between Friday, August 16 and Sunday, August 28, 1994, 17 sea turtle strandings, including at least 7 ridleys, were observed on beaches between Freeport and Sabine, Texas. Five of these turtles had missing limbs, including at least 4 in which human interactions were suspected due to straight-edged wounds. Veterinarian inspection of turtles without limbs for confirmation of human interactions were inconclusive. Nine additional turtles were observed between Freeport and Sabine on Monday, August 29, 1994. NMFS employees observed shrimping effort nearshore of beaches on which strandings were observed during this period.

Increased enforcement appeared to effectively reduce sea turtle mortalities. Violation rates decreased and fishing effort may have been dispersed by enforcement effort. In addition, high stranding rates subsequent to enforcement efforts suggest that some participants in the nearshore component of the shrimp fleet off Texas may modify their fishing practices by altering TEDs or altering fishing areas in response to the level of enforcement presence. Regardless of whether the reduction in mortalities is due to deterrence of violations or dispersal of fishing effort, there is a clear relationship between increased enforcement efforts and reduced sea turtle mortalities.

f. Use of Soft TEDs May Cause Sea Turtle Mortalities

Evidence that the use of soft TEDs may be causing some sea turtle mortalities is accumulating. A study by Georgia Sea Grant and NMFS gear specialists indicates that some soft TEDs (specifically the Morrison) can bag or pouch in the net even when installed in

accordance with current regulations. This bagging or pouching can then result in the entanglement and mortality of turtles. Additionally, enforcement officers cannot always effectively evaluate soft TEDs. They are difficult to observe in the net due to the amount of webbing involved. Tears and holes can easily be overlooked. These problems have been recognized and reported by members of the shrimp industry. As a term and condition of the incidental take statement for this opinion, NMFS must reexamine soft TEDs to determine if they still warrant NMFS certification.

2. Impacts to the Kemp's ridley population

There have been documented takes of green, leatherback and hawksbill sea turtles in shrimp trawlers in the Gulf of Mexico, however, the primary species taken are loggerheads and Kemp's ridleys, due to their benthic feeding habits in areas of high shrimping effort. While shrimping is considered the primary cause of the continued threatened status of the loggerhead population, the industry's immediate potential to jeopardize the continued existence of the severely endangered Kemp's ridley population is of greater concern.

Precise data regarding the total number of Kemp's ridleys in the Gulf of Mexico population in 1994 are not available. Trends in turtle populations are identified through monitoring of their most accessible life stages on the nesting beaches, where hatchling production and the number of nesting females can be directly measured. Most Kemp's ridley nesting occurs in aggregations, called arribadas, on a single beach at Rancho Nuevo, Mexico. Film taken in 1947 documented over 40,000 nesting females in a single day during an arribada at Rancho Nuevo (Carr 1963). Bi-national protection and monitoring by Mexico and the United States has occurred on the nesting beach since 1978. Arribadas of up to 200 females have rarely been observed during that period (FWS and NMFS, 1992). Nest production plummeted to only 702 nests in 1985, but has been steadily increasing since that time (R. Byles 7/94). Over 1500 nests have been observed during the 1994 nesting season, representing the highest nesting year since monitoring was initiated. While these data need to be interpreted cautiously due to expanded monitoring efforts since 1990, up to 110,000 hatchlings may be released from Rancho Nuevo this year, compared to 50,000 to 80,000 over the last 5 - 6 years (Byles, pers comm).

All documented evidence suggests an upward trend in the ridley population. However, the Recovery Plan for the Kemp's ridley sea turtle (*Lepidochelys kempii*) (FWS and NMFS, 1992) has identified a recovery criteria of 10,000 nesting females in one season as a prerequisite for a determination that Kemp's ridleys can be downlisted to threatened status. Considering 58% of all adult females appear to nest in any one year, and each female lays an estimated 2.7 nests, 1500 nests documented in 1994 represents less than 1000 adult female Kemp's ridleys in the entire

population. This is less than 2.5% of nesting females observed in one day in 1947, and only 10% of the downlisting criterion identified in the Recovery Plan. Continued protection of all life stages of Kemp's ridleys is necessary to increase recruitment to the reproductive population and insure recovery of the species.

Since April, 1994, at least 27 of the stranded Kemp's ridleys observed may have been adults (defined as ridleys with curved carapace length greater than or equal to 60 cm). Sex could only be identified in 11 carcasses. Seven of these were females, including three with tags from Rancho Nuevo indicating they had nested at the main nesting beach. A fourth tagless female was gravid. Determination of the sex of sea turtles often depends upon internal examination of relatively fresh carcasses. Secondary sex characteristics, such as the longer tail in adult males, are only reliable in extreme cases or when verified through an internal examination. The total number of adult females ridleys stranded during 1994 could be anywhere from 7 to 30 turtles, representing up to 3.0 percent of the adult female population. The nesting season ended in August, therefore post-nesting females may be available to interactions with the fishery in the northern Gulf of Mexico.

While there has been some increase in the Kemp's ridley population over the past ten years, population growth at a rate that would solely explain the increase in strandings is not likely. Henwood and Stuntz (1987) suggested that, through 1984, 501 Kemp's ridleys (+/- 501) were killed annually in the Gulf of Mexico shrimp fishery prior to implementation of TED regulations. A reduction in incidental take by up to 97%, anticipated with full compliance with TED regulations, would result in only 15 lethal takes at the 1984 catch rates and population levels. Therefore, 300 ridley strandings (reported in 1994) would represent a twenty-fold increase in the Kemp's ridley population in the Gulf of Mexico if the increase in population alone accounted for the increase in strandings. Biologically, a twenty-fold increase in the size classes observed as strandings is not possible over a ten-year period. This implies that this year's turtle mortalities have far exceeded expectations based on assumptions regarding the use of TEDs and compliance with TED regulations. Furthermore, based on current population estimates, the population likely cannot sustain the current level of mortalities.

E. Conclusion

There is no information to determine precisely why catch rates of sea turtles, especially Kemp's ridleys, appeared to increase in the northern Gulf of Mexico during 1994. Mortalities caused by factors other than shrimp trawling can be attributed to only a small percentage of the total strandings. Intensive enforcement

efforts revealed non-approved TEDs and some non-compliance with TED requirements. Gear problems with legal soft TEDs and the lack of flotation on bottom opening hard-grid TEDs prior to implementation of the float rule, likely resulted in ineffective TED use. These elements, combined with the synchronous occurrence of dense fishing effort and sea turtle abundance in north Texas and Louisiana, likely caused the unprecedented number of Kemp's ridley and loggerhead strandings observed so far in 1994. Enforcement efforts appear to be effective in reducing nearshore mortalities as evidenced by strandings. Furthermore, removal of enforcement resources results in immediate resumption of high sea turtle mortality rates.

Strandings represent the minimum mortality of sea turtles. Therefore over 300 Kemp's ridleys, including adults, have been lost to the ridley population in the first 8 months of 1994 in Texas and Louisiana waters. While numbers of Kemp's ridley nests have slowly increased in recent years, the number of mature females remains below 1000. Although the ridley population has probably increased since nesting beach protection and TED regulations have been implemented, it is not likely that the population can sustain the level of mortality reflected by 1994 Texas and Louisiana strandings. Review of the best available information indicates that intensive nearshore shrimp trawling effort during periods of sea turtle abundance is the cause of the mortality of most of the sea turtles observed on Texas and Louisiana beaches.

Continued long-term operation of the shrimp fishery in the southeastern U.S., resulting in mortalities of Kemp's ridley turtles at levels observed in the Gulf of Mexico in 1994, is likely to jeopardize the continued existence of the Kemp's ridley population. Continued long-term operation of the shrimp fishery, resulting in loggerhead mortalities at levels observed to date are not likely to jeopardize the continued existence of loggerheads, but could prevent the recovery of this species. There is no new information to suggest that hawksbill, leatherback and green sea turtles are adversely affected by the shrimp fishery in any manner not already considered in previous consultations.

In summary, the major apparent cause of the strandings is the incorrect installation and improper use of TEDs by shrimpers in the Gulf of Mexico. Other causes include: 1) certification of TEDs which are ineffective due to their complexity or incompatibility with net types; and 2) intensive "pulse" fishing in areas of high sea turtle abundance during spring and summer 1994. The simultaneous occurrence of intensive pulse fishing and Kemp's ridley turtles may have led to the repeated submergence of individual sea turtles in short time periods, which could have contributed to the high levels of mortalities.

These factors are likely to be repeated in future years without modification to the management of the shrimp fishery. While levels of compliance may fluctuate, nearshore effort is likely to remain high in the future. Therefore, modifications to the management of the shrimp fishery are necessary to enable shrimp trawling to continue without jeopardizing the continued existence of the Kemp's ridley population or preventing the recovery of the loggerhead population. These modifications are specified in the reasonable and prudent alternative. These actions address the major apparent causes of the 1994 strandings.

F. Reinitiation of Consultation

Reinitiation of consultation is required if: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of this action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. Specifically, new information that may be used as a basis for reinitiation includes stranding data, enforcement reports, necropsies, studies of nearshore shrimping effort, or other new information that may indicate that shrimp fishing affects listed species or critical habitat to an extent or in a manner not previously considered. This includes new information acquired through the implementation of the reasonable and prudent alternative and reasonable and prudent measures.

Reinitiation is required within two years of issuance of this opinion in order to reevaluate the biological opinion and incidental take statement for the shrimp fishery, unless consultation is reinitiated sooner.

REASONABLE AND PRUDENT ALTERNATIVE

The regulations implementing Section 7 of the Endangered Species Act (50 CFR §402.14 (i)(h)(3)) specify that a "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any." The following reasonable and prudent alternative can be taken to avoid the likelihood of jeopardizing the continued existence of the Kemp's ridley sea turtle. It can be implemented in a manner consistent with the scope of NMFS' legal authority and jurisdiction, and it is economically and technologically feasible. NMFS concludes that by insuring adequate compliance with existing sea turtle conservation measures, continued long-term operation of the shrimp fishery is not likely to jeopardize the continued existence of the Kemp's ridley sea turtle, if the following reasonable and prudent alternative is implemented.

1. The following component of the reasonable and prudent alternative is necessary to ensure that short-term, immediate shrimp fishing operations are not likely to jeopardize the continued existence of Kemp's ridley sea turtles.

NMFS must insure that enforcement efforts, in cooperation with state and federal enforcement agencies, will remain at or near current effort levels, as of October 15, 1994, in the Gulf of Mexico and Atlantic through November 30, 1994.

2. The following components of the reasonable and prudent alternative are necessary to ensure that long-term, continued operation of the shrimp fishery is not likely to jeopardize the continued existence of any species of sea turtle in the future:

A. Improve TED Regulation Compliance

1) Within four months of the date of this opinion, NMFS must formulate an emergency response plan, approved by the Assistant Administrator, to respond to sea turtle stranding events and to insure compliance with sea turtle conservation measures. This plan must include a system to quickly increase enforcement efforts, in cooperation with state and Federal enforcement agencies, in response to:

- a) increased strandings in areas of shrimping effort; or
- b) reports of increased noncompliance with TED regulations.

In addition, the plan must include criteria that set forth specific guidelines for conservation measures that will be implemented as mortality levels approach the established incidental take levels. The plan must also provide that in the event that sea turtle takings reach or exceed 75% of

either the documented or indicated incidental take level established in the incidental take statement, NMFS must implement immediate conservation measures to reduce the impact of shrimp in affected areas. These measures include, but are not limited to, the implementation of the following: prohibitions on nighttime shrimp, restrictions on the number and size of trawl nets, restrictions on the size of trypnets, authorization of only top-shooting, hard-grid TEDs, or area closures. NMFS must ensure that identified conservation measures can be implemented in a timely manner.

2) As part of the implementation of the emergency response plan, within four months of the date of this opinion, NMFS must form a TED enforcement team consisting of at least five enforcement agents specially trained in TED technology. This team will be deployed in response to:

- a. reports of increased strandings in areas of shrimp effort;
- b. reports of increased noncompliance with TED regulations; or
- c. reports of intensive shrimp effort in areas of expected sea turtle abundance.

3) NMFS, in cooperation with the U.S. Coast Guard, must immediately develop and implement a training program designed for Coast Guard boarding parties, including introductory training, refresher and update programs. NMFS must request that the U.S. Coast Guard perform coastal aerial surveys to monitor nearshore shrimp effort.

4) Within one month of the date of this opinion, NMFS domestic TED technology transfer programs must be amplified to allow NMFS gear specialists to provide information to shrimpers and gear manufacturers through additional workshops and dockside TED inspections regarding installation and efficient use of TEDs. This effort should include the development of media aids (brochures, videos) that the shrimpers readily can obtain.

5) Within four months of the date of this opinion, in coordination with the states and fishery management councils, NMFS must propose a system under applicable authority establishing registration requirements for all shrimp trawlers fishing in waters seaward of the COLREGS line. In fulfilling this requirement, NMFS will consider implementing the registration system through existing or alternative state programs. Fishery permitting or registration will improve enforcement by providing a mechanism to sanction shrimpers, including but not limited to egregious or multiple violators, or shrimpers refusing to take observers. Permitting or registration would also allow

fishing authorization to be withheld pending payment of assessed fines. Additionally, the vessel registration data base would provide a mechanism to directly provide shrimpers with information on sea turtle conservation measures.

B. Reexamine Certain NMFS-Approved TEDs

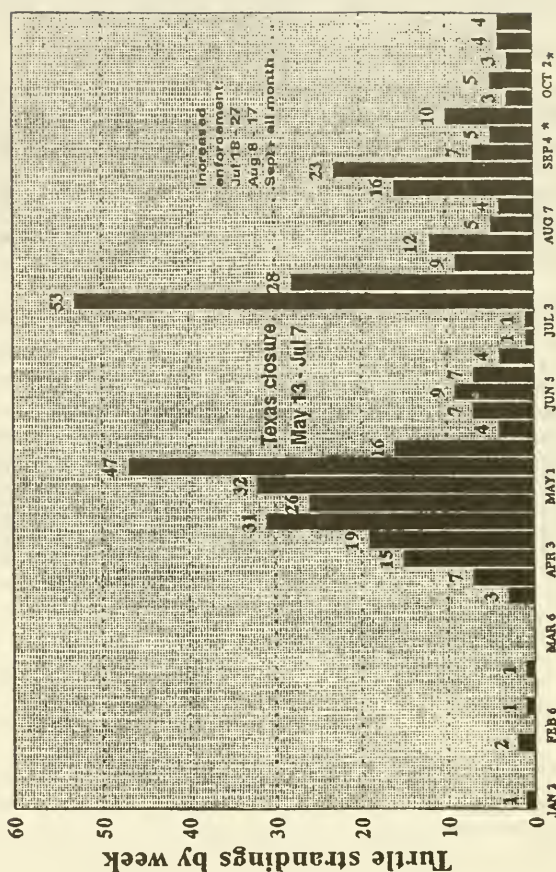
Within three months of the date of this opinion, NMFS must reexamine NMFS-approved soft TEDs and bottom-shooting hard TEDs to reconsider whether they effectively reduce the incidental take of sea turtles by shrimp trawlers. As part of this reexamination, recall of soft TEDs or implementation of a program restricting the use of soft TEDs should be considered. Additionally, NMFS should review the TED approval process to insure that approved TEDs can be used effectively by shrimpers. NMFS will make public the results of the reexamination and review.

C. Mitigate Impacts of Intensive Nearshore Shrimping Effort

Within one year of the date of this opinion, NMFS shall identify areas requiring special sea turtle management considerations, due to high sea turtle abundance or important nesting or foraging habitats. NMFS shall propose management measures to mitigate the impacts of intensive nearshore shrimping pulses, and to prevent repeated captures of individual turtles. These measures include, but are not limited to, the following: prohibitions on nighttime shrimping, restrictions on the number and size of trawl nets, restrictions on the size of trynets, authorization of only top-shooting, hard-grid TEDs, reducing the density of shrimp vessels, and/or temporary area closures.

1994 TEXAS SEA TURTLE STRANDINGS

OFFSHORE BEACHES



Sept and Oct reports include inshore strandings

Week (beginning Jan 2)

n = 426

0022

NMFS SENG

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AFS & Foundation Shrimp Trawler Bycatch Observer Program
 rtle Captures Reported: April 14, 1992 - August 4, 1994

Date Travel Status	Sea Days	State Depth	TED/Opeslog	Turtle Species	Method Captured	Turtle Condition
April 14 - 30, 1992	15	TX/Nearshore	Morrison Soft/Top	Leatherback	Slid Out/TED	Fresh Dead
me 16 - July 7, 1992	-10	SC/Nearshore	Morrison Soft/Top	Loggerhead Loggerhead	Try Net Slid Out/TED	Alive/Conscious Alive/Conscious
July 3 - 16, 1992	14	TX/LA/Nearshore	GA Jumper/Bottom	Loggerhead	Try Net	Alive/Conscious
July 5 - 24, 1992	18	TX/Nearshore	GA Jumper/Bottom	Unknown	Slid Out/TED	Alive/Conscious
July 16 - 24, 1992	5	SC/Nearshore	Morrison Soft/Top	Loggerhead	Try Net	Alive/Conscious
ly 22 - August 1, 1992	11	GA/Nearshore	Burbank/Bottom	Loggerhead Loggerhead Unknown	Try Net Try Net TED Net	Alive/Conscious Fresh Dead Dead
Sept. 22 - Oct. 2, 1992	9	LA/Nearshore	None	Kemp's Ridley Kemp's Ridley	Main Net Main Net	Decomposed Fresh Dead
December 2 - 9, 1992	6	MS/Sound	None	Green	Try Net	Alive/Conscious
May 13 - 22, 1993	10	GA/Offshore	GA Jumper/Bottom	Loggerhead Loggerhead Loggerhead	*Try Net *Try Net *Try Net	Alive/Conscious Alive/Conscious Alive/Conscious
May 19 - June 15, 1993	27	W. FL/Near&Off	Anthony Weedless/Bottom	Loggerhead Unknown	Slid Out/TED Slid Out/TED	Fresh Dead Fresh Dead
May 31 - June 9, 1993	10	GA/SC/Nearshore	GA Jumper/Bottom	Loggerhead Loggerhead	Slid Out/TED Try Net	Alive/Conscious Alive/Conscious
June 22 - June 26, 1993	5	NC/Inshore	Anthony Weedless/Bottom	Loggerhead Loggerhead	TED Net TED Net	Alive/Conscious Alive/Conscious
July 5 - 9, 1993	5	GA/Offshore	Morrison Soft/Top	Loggerhead Loggerhead	Try Net Try Net	Alive/Conscious Alive/Conscious
July 21 - Aug. 9, 1993	20	LA/Near/Offshore	Supershooter/Bottom	Leatherback	Slid Out/TED Net	Fresh Dead
July 26 - 29, 1993	4	GA/Nearshore	Supershooter/NG	Loggerhead	Try Net	Alive/Conscious
October 12 - 25, 1993	14	LA/Near/Offshore	Supershooter/Bottom	Leatherback	Slid Out/TED	Alive/Conscious
April 7 - May 7, 1994	31	FL/In/Near/Off	Barker/Bottom	Kemp's Ridley	TED Net	Alive/Conscious
April 28 - May 21, 1994	20	FL/Offshore	Andrews 8"	Loggerhead	Slid Out/TED Net	Alive/Conscious
July 7 - July 22, 1994	16	TX/Offshore	Andrews 8"	Kemp's Ridley	TED Net	Alive/Conscious

NG - Data Not Given

* 22 foot

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Incidental Take Statement

Section 7(b)(4) of the Endangered Species Act (ESA) requires that when a proposed agency action is found to be consistent with action 7(a)(2) of the ESA and the proposed action may incidentally take individuals of listed species, NMFS will issue a statement that specifies the impact of any incidental taking of endangered or threatened species. It also states that reasonable and prudent measures, and terms and conditions to implement the measures, be provided that are necessary to minimize such impacts. Only incidental taking resulting from the agency action, including incidental takings caused by activities approved by the agency, that are identified in this statement and that comply with the specified reasonable and prudent alternatives, and terms and conditions, are exempt from the takings prohibition of section 9(a), pursuant to section 7(o) of the ESA.

Observers have documented approximately 10,000 hours of trawling per year in the Gulf of Mexico since the observer program was initiated in 1992. Table 1 lists the results of these efforts in both the Atlantic and the Gulf of Mexico. Ten thousand hours represent only about 0.2% of all shrimping effort in the Gulf, and while the observer data provide insights into the fishery, the program cannot be used as the primary tool to monitor the level of incidental takes. Establishment of a statistically valid observer program is prohibitively expensive. Therefore, use of the stranding network for indirect monitoring of the effects of the shrimp fishery is required. Stranding data must be used cautiously due to other potential sources of mortality in coastal waters. For those areas with nearshore closures of the shrimp fishery, strandings during closures may provide background levels regarding local mortality levels in the absence of shrimp trawling.

The incidental take level for the Atlantic and Gulf of Mexico shrimp fishery of a documented lethal or non-lethal take of

- four (4) Hawksbill,
- four (4) leatherback,
- four (4) green,
- eight (8) Kemp's ridley, or
- twenty (20) loggerhead turtles

is identified pursuant to Section 7(b)(4) of the ESA. This take level represents a total documented annual take for all shrimp trawling in the southeastern United States, based on the estimated number of takings that would be documented under the current level of observer coverage if the shrimp fishery was in full compliance with existing TED regulations. If this incidental take level is met or exceeded, NMFS must reinitiate consultation.

Further, an indicated take level is established. Because unusually high strandings during periods of intensive shrimping activities may indicate turtle mortality in the shrimp fishery, NMFS will use stranding data as an indicator of take levels. If during periods in which intensive shrimping effort occurs there are no significant or intervening natural or human sources of mortality other than shrimping conclusively identified as the cause of strandings, then strandings will be considered an indicator of lethal takes in the shrimp fishery if:

- 1) in areas of shrimping effort, weekly strandings in any NMFS statistical zone reach twice the previous three-year weekly average (taking into consideration anomalous years) for that zone; or
- 2) in areas of shrimping effort, weekly strandings in any NMFS statistical zone reach twice the highest weekly level during a shrimp fishery closure period (after the first seven days of closure) within the same season in that zone.

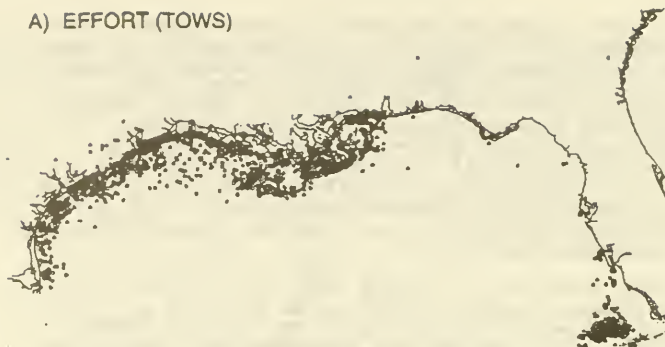
The terms and conditions and reasonable and prudent measures established in the incidental take statement accompanying the August 19, 1992 biological opinion on the shrimp fishery remain valid and are incorporated by reference into this incidental take statement.

In addition, the following reasonable and prudent measures are required:

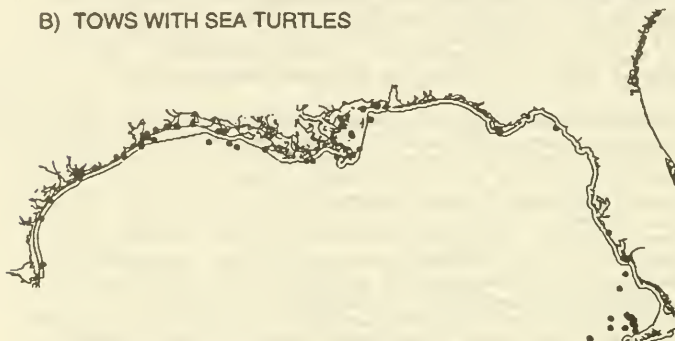
- A. If stranding levels indicate that either the documented or indicated incidental take level is being approached, then NMFS shall take the emergency actions identified in the emergency response plan required in the reasonable and prudent alternative of this biological opinion.
- B. NMFS shall ensure that sea turtle incidental take levels and shrimp fishery effort levels are effectively monitored and accurately estimated. In order to implement this measure, the following terms and conditions are required:
 1. Within thirty days of the date of this opinion, NMFS must identify areas within the Sea Turtle Stranding and Salvage Network (STSSN) to determine where increased effort is needed to adequately monitor sea turtle strandings. Accordingly, within four months of the date of this opinion, NMFS must ensure that intensive stranding monitoring be established in states with low stranding coverage such as Louisiana, Alabama and Mississippi. Increased sea turtle stranding reporting is necessary to identify trends in incidental takes during nearshore shrimping.

2. Within three months of the date of this opinion, NMFS must determine the previous three-year weekly averages of sea turtle strandings (taking into consideration anomalous years), by NMFS statistical zone, as identified in the indicated take level above. State coordinators must be advised of these threshold numbers, and must be requested by NMFS to provide timely notification if stranding rates exceed identified thresholds. In addition, NMFS should enter into a Memorandum of Understanding with the U.S. Fish and Wildlife Service to promote better beach monitoring for stranding reporting.
 3. NMFS must continue to improve observer coverage in the shrimp fishery in both the Atlantic and Gulf of Mexico in order to better document the level of incidental take. In improving observer coverage, NMFS shall seek to achieve a level of 1% observer coverage on shrimp fishery vessels operating seaward of the COLREGS line, within two years of the date of this opinion. The documented take level may be revised accordingly.
 4. Within three months of the date of this opinion, NMFS must select a team of population biologists, sea turtle scientists, and life history specialists to compile and examine information on the status of sea turtle species. The team should attempt to identify (a) the maximum number of individual sea turtles of each species that can be taken incidentally to commercial fishing activities without preventing the recovery of the species, (b) the maximum number of individuals that can be taken incidentally to commercial fishing activities without jeopardizing the continued existence of any listed sea turtle species, and (c) the number of stranded sea turtles occurring in each statistical zone that indicate incidental takes are occurring at levels beyond those authorized.
 5. As part of ongoing and future research efforts, NMFS must evaluate other human-caused sources of sea turtle mortality, and identify measures to reduce those sources of mortality.
- C. NMFS shall reinitiate consultation on this action within two years of the date of this opinion in order to reevaluate the biological opinion and incidental take statement for the shrimp fishery, unless consultation is reinitiated sooner.

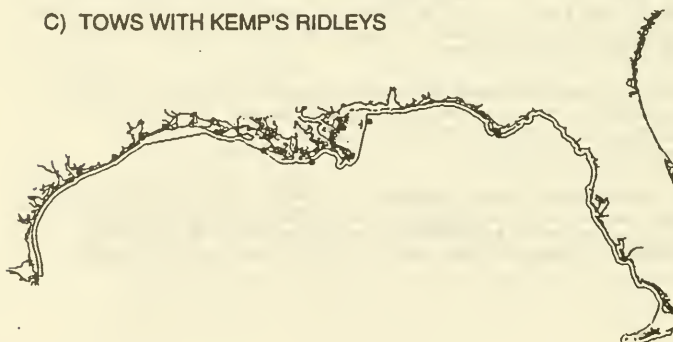
A) EFFORT (TOWS)



B) TOWS WITH SEA TURTLES



C) TOWS WITH KEMP'S RIDLEYS



Distribution of NMFS observer trawl effort (6,405 tows) in the Gulf of Mexico (A), the tows containing the 69 sea turtles collected (B) and the tows containing the 12 Kemp's ridley sea turtles collected. A shoreline buffer extending generally to 10 km offshore (except off the upper Texas coast and western Louisiana) is provided for reference.

Presentation to:

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES
ENDANGERED SPECIES ACT TASK FORCE
BOERNE, TEXAS
MARCH 20, 1995

by

A. WAYNE WYATT, MANAGER
HIGH PLAINS UNDERGROUND WATER CONSERVATION DISTRICT NO. 1

Mr. Chairman, Distinguished Members of Congress:

Thank you very much for coming to Texas to conduct this field hearing to obtain public input to be used in rewriting the Endangered Species Act. First and foremost, we support this effort 100 percent.

In our opinion, the Endangered Species Act is being used as a tool to control and manage the natural resources of our nation. We do not believe this was the intent of Congress when they originally passed the Act or amendments to the Act.

This Act is currently being used in an effort to obtain control of the water, land, and people in the High Plains of Texas. On August 3, 1994, the U.S. Fish and Wildlife Service published a proposed rule to list the Arkansas River shiner as endangered in the Canadian River in Texas. (A summary of the proposal is at the end of this presentation.)

Upon reading the proposed rule, it was evident that much of the information was incorrect or at least stated so generally that any interpretation made by the reviewer could be justified.

We petitioned under the Freedom of Information Act for a copy of all the data used by the U.S. Fish and Wildlife Service to write this proposed rule. Upon its receipt, we found conflicts between the actual data set and the proposed rule.

We then secured a copy of the Endangered Species Act of 1973, amendments to the Act, and administrative rules by which the Act is administered.

It immediately became obvious that we were about to begin play against a stacked deck. We certainly commend the U.S. Fish and Wildlife Service for their carefully crafted process, which avoids any serious opposition to the listing of a species as endangered until they have woven their net so carefully and tightly that those who will be affected have in essence been ambushed. It certainly is not a process of fair and equitable treatment to those

who will be affected by the process.

We learned a great deal about the process and have some suggestions for your consideration. They are as follows:

The U.S. Fish and Wildlife Service is required to publish the proposed rule to list a species as endangered in the *Federal Register*. No local publication notice is required, which means that the average citizen would not know of the proposed listing. Any proposed rule should require publication of notice in a newspaper with general circulation throughout the affected area in which a species is being proposed for listing as threatened or endangered.

Secondly, no local hearings are required unless a request for a local hearing is made under specific guidelines. If a local hearing is held, no local notice of when or where the hearing is to be held is required, nor is there any obligation to notify the person or party who made the request for the local hearing. (Notice of the Amarillo, Texas, public hearing on the proposed listing of the Arkansas River shiner was published in the *Federal Register*, but many who had made proper requests for a hearing and for notice of a hearing were never notified of the time, date, or place. This included State Representatives, State Senators, producer groups, and U.S. Senator Phil Gramm.) We recommend that notice of public hearings be required to be published in local newspapers of general circulation throughout the affected area at least 10 days prior to the hearing and that the notice be display ads, not placed with the legal notices.

The U.S. Fish and Wildlife Service is required by law to assess the best scientific and commercial information available on the species and the threats faced by this species for drafting the rule and listing the species as endangered. The key word is "available." In practice, the best available scientific and commercial data could be hearsay or a one-day survey. The data to be used to draft a proposed rule needs to be subjected to close scrutiny by qualified scientists who are not employees of the U.S. Fish and Wildlife Service to determine whether or not the data is adequate to justify action.

In our opinion, the entire listing process needs to be revised. As we understand it, the U.S. Fish and Wildlife Service writes the proposed rule, after which they receive and review public comments. They (U.S. Fish and Wildlife employees) then make the final determination as to whether or not to list the species as endangered. I was told that the same person who drafted the proposed rule generally serves as the principal reviewer of public comment. In this process, the U.S. Fish and Wildlife Service employees in essence serve as prosecutor, judge, jury, and executioner with the defense absent, except for having had the opportunity to provide comments, provided they even know about the proposed listing! Any and all comments provided by the public can be totally ignored.

The review process should be conducted by a non-biased peer review group comprised of trained scientists with expertise in all areas addressed in the proposed rule, including zoologists, biologists, geologists, hydrologists, engineers, etc. These could be selected from a list of willing scientists by a random select computer program.

Through press releases and at a hearing, the U.S. Fish and Wildlife Service goes to great lengths to assure the public that the listing of a species as endangered does not give the Service any regulatory authority. Strictly speaking, that is correct. However, if the species is listed as endangered, they are required to proceed to the designation of critical habitat for the species. They carefully explain that even after the critical habitat designation, they can only require federal agencies to comply with protection plans for the listed species. This also is true. However, should litigation occur, as in south-central Texas, the federal courts could rule that the Service has not met its obligation under the Endangered Species Act. If that happens, the court can then order regulation, or stricter regulation, by the Federal Government, the State, or local entities. The Edwards Aquifer lawsuit is a prime example.

In the Edwards Aquifer lawsuit, the Sierra Club, et al, sued the Department of Interior, U.S. Fish and Wildlife Service, for not sufficiently protecting listed endangered species. The court ruled in their favor; and under the present system, we the taxpayers are required to pay for the suit. The *San Antonio Express* reported that the Sierra Club, et al, filed for almost \$5 million as their costs for this action. I sat through and listened to much of the testimony in this lawsuit. The U.S. Fish and Wildlife Service offered little or no defense for their inactions. The listing and critical habitat designation had progressed past the point where it could be effectively challenged. Therefore, the outcome of the suit was almost a foregone conclusion.

The process as it now stands invites lawsuits to force enforcement by providing a wonderful opportunity to earn large legal and technical witness fees by filing against a party, (U.S. Fish and Wildlife) who wants to be given the power to enforce rules to control the habitat of a listed species.

In most states, a single agency is charged with protecting and managing fish and wildlife. In our instance, it is the Texas Parks and Wildlife Department. State fish and wildlife agencies are encouraged — or in essence, bribed — to support federal listing of species as endangered through automatic funding to make studies and design recovery plans for listed species. We are proud to report that the Texas Parks and Wildlife Department did not yield to this temptation and testified against the listing of the Arkansas River shiner as being endangered in the Canadian River in Texas.

As I stated earlier, the management of the Endangered Species Act by the U.S. Fish and Wildlife Service has been very cleverly constructed to achieve whatever goal they wish to achieve, while providing minimum opportunity by affected parties to block the effort, even if there is no reason to list the species and even if the information used to justify the listing and designate critical habitat is inaccurate or incomplete.

In our battle with the U.S. Fish and Wildlife Service concerning the proposed listing of the Arkansas River shiner as an endangered species in the Canadian River, Texas, we learned that the species is neither threatened nor endangered in the Canadian River in Texas. This was confirmed by recent studies made by the Texas Parks and Wildlife Department (a copy of their statement presented at the hearing is attached.) The author of the study funded

by the U.S. Fish and Wildlife Service noted that the population of the Arkansas River shiner in the Canadian River of Texas is abundant and thriving and did not recommend that the Arkansas River shiner be listed as threatened or endangered in the Canadian River in Texas. The U.S. Fish and Wildlife Service acknowledge this fact, but contend that it is the only healthy, thriving population remaining and that a single catastrophic event could wipe it out if it is not protected. No example of a single catastrophic event was given. The fact is that the population in the Canadian River of Texas is divided into two segments by the Sanford Dam, which creates the Lake Meredith Reservoir. Further, in their presentation, the U.S. Fish and Wildlife Service people acknowledged that another thriving population was known to be present in the Pecos River in New Mexico. However, they contend that this is an introduced population, not native, and they do not propose to include it in the listing.

The U.S. Fish and Wildlife Service rules limit what can be considered during the proposed listing process. Only the following topics can be addressed in the listing process.

- "(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;"
- "(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by Section 4 of the Act;"
- "(3) Additional information concerning the range, distribution, and population size of this species; and"
- "(4) Current or planned activities in the subject area and their possible impacts on this species."

Extensive reference was made in the proposed rule to habitat and habitat modification, much of which was incorrect, especially that related to geology and hydrology. The listing process does not require the reviewer to consider rebuttal on habitat reference, even though such references are used extensively in the proposed rule as a basis for the writing of the rule.

True and accurate data should be required as a part of the listing process on historical habitat, current habitat, and the effects of habitat modification to the species. As an example, the proposed rule on the Arkansas River shiner stated:

"In Texas, withdrawals of groundwater in the Canadian River Basin were as much as 33 times higher than the annual natural recharge in 1980, and irrigation return flows in the Basin are negligible (Texas Department of Water Resources 1984). When groundwater is pumped faster than it is restored, water tables drop, channel seepage ceases, and streams cease to flow. Under these conditions, suitable habitat to support Arkansas River shiner populations is non-existent."

The truth is no geologic/hydrologic connection between the Canadian River and the Ogallala Aquifer or any other aquifer across about two-thirds of the reach of the Canadian River in Texas from the Texas/New Mexico boundary eastward across Oldham County (45 miles), Potter County (35 miles), and Hutchinson County (20 miles). The remaining 70 miles does cut through the Ogallala Formation. However, a mound of water occurs in the vicinity of the river, indicating discharge from the river rather than drainage of the aquifer into the river. Extensive geological and hydrological data, including maps, were presented at the U.S. Fish and Wildlife Service hearing to illustrate that the information on which the proposed rule was based was totally incorrect.

We supported passage of the Endangered Species Act in 1973 because we were naive enough to believe that the purpose of the Endangered Species Act was to protect species such as the American Eagle, the grizzly bear, and the sea otter from being hunted and from other intentional harm. We continue to support this concept of the Endangered Species Act, but only to protect keystone species.

For those of you not familiar with what is referred to as "keystone species," perhaps a short history of the adventure of the sea otter, a keystone species, would be in order.

"Perhaps, the most potent keystone species known in the world may be the sea otter (*Enhydra lutris*). This wonderful animal, large and supple in body, cousin to the weasels, whiskered like a cat, stares with a deadpan expression, once thrived among the kelp beds close to shore from Alaska to southern California. It was hunted by European explorers and settlers for its fur, so that by the end of the nineteenth century it was close to extinction. In places where sea otters disappeared completely, an unexpected sequence of events unfolded. Sea urchins, normally among the major prey of the otters, exploded in numbers and proceeded to consume large portions of the kelp and other inshore seaweeds. In otter times, the heavy kelp growth, anchored on the sea bottom and reaching to the surface, was a veritable forest. Now it was mostly gone, literally eaten away. Large stretches of the shallow ocean floor were reduced to a desert-like terrain, called sea-urchin barrens."

"With strong public support, conservationists were able to restore the sea otter and with it the original habitat and biodiversity. The otters waxed and the sea urchins waned. The kelp forests grew back to its original condition. A host of lesser algal species moved in, along with crustaceans, squid, fishes, and other organisms. Gray whales migrated closer to shore to park their young in breaks along the kelp edge while feeding on the dense concentrations of animal plankton." (Wilson, Edward D., The Diversity of Life Cambridge: Belknap Press of Harvard University Press, 1992.)

This to me reflects a balance of nature. Should the sea urchins have been listed as an endangered species, the sea otter could not have been reintroduced and the ocean floor would have remained barren today.

Conclusion

Due to the excessive abuse of the Endangered Species Act as is illustrated on the attached drawing, we recommend that Congress totally void the Endangered Species Act and all prior actions pertaining to the Act. Thereafter, we recommend that Congress pass new legislation to protect only keystone species, after adequate study has been made of the species to convince a non-biased peer review group that the species is truly a keystone species and is truly endangered.

Prior to the listing of a keystone species as endangered, the U.S. Fish and Wildlife Service should be required to develop and implement a recovery plan for the species, which would include public education programs on the value of the species to society, its habitat requirements, the time required to implement the plan, and the approximate cost to implement the plan. Should the proposed recovery plan include the use of private property, private property modification, or restriction on the use of private property, a reasonable offer of funds should be made to the owners/operators of the private property to compensate them for their effort and/or loss. Only after a recovery plan has been implemented and the keystone species' numbers continue to decline over at least a decade period, might the species be considered for listing for additional federal protection.

The listing process should require actual survey data on the population of the keystone species in a specific area over a sufficient period of time to flatten the effects that weather cycles have had on the keystone species and its habitat. To be considered for listing, the population of the keystone species must show a net decline in population of over 80 percent over the period of record for the total study area. For those portions of the study area where the survey data does not reflect a decline in population of over 50 percent, the area and the population of the species in the area may not be included as endangered nor the habitat designated.

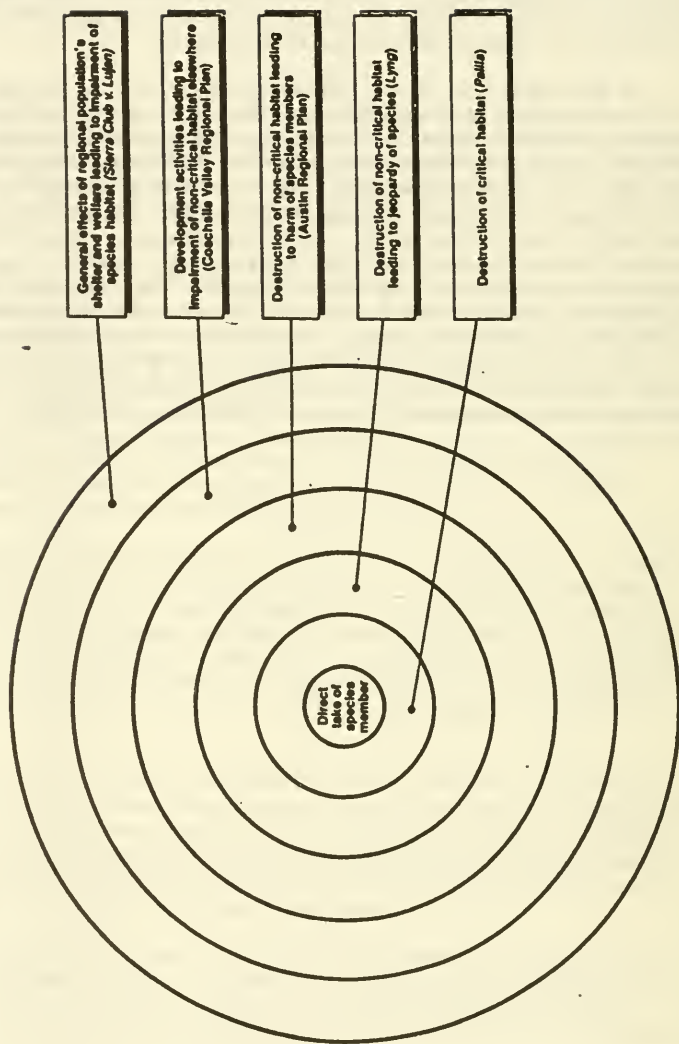
The listing process should also include details of the historic habitat and the current habitat, including specific detailed data on how the original habitat has been modified and the actual effects the modification has had on the species. Additionally, projections should be required of the U.S. Fish and Wildlife Service of the probable effects that any further modification of the habitat would have on the health and welfare of the keystone species. These should not be assumptions, but specific detailed data.

After due and proper notice has been given that the keystone species is proposed for listing as an endangered species to the public in the affected area which would include publication in the *Federal Register*, publications in newspapers of general circulation throughout the proposed affected area and news releases to electronic media in the proposed affected area, a public hearing must be conducted.

The data required to be collected as described previously must be made available to the public at the actual cost of duplication. A 90-day review and comment period should be provided prior to a public hearing. Prior to the public hearing, the same public notice publications as the proposed listing proposal would be required.

At the public hearing, the U.S. Fish and Wildlife Service would be required to review all data, respond to questions, and explain why the recovery plan is not adequate to protect the species. They further should be required to lay out in detail additional or increased protection needed to protect the keystone species. The U.S. Fish and Wildlife Service should also be required to provide details of how the additional or increased recovery plan will affect and/or benefit the area or region intended for inclusion in the revised plan. This would include social and economic data, as well as the approximate mitigation cost to the public for all actions taken that would affect private property. A cost/benefit analysis would be required prior to the species being listed as endangered. A summary of all the data would be provided to an oversight committee of the U.S. Congress. The oversight committee could approve and/or disapprove of the listing. If they approve the listing, special appropriations would be required to pay for private property, private property modification, use of private property, and to fund the work to be performed by the U.S. Fish and Wildlife Service. Only after the appropriations were made, the species would be listed as endangered.

**ILLUSTRATION OF THE LIMITS OF ENDANGERED SPECIES ACT JURISDICTION:
Sierra Club v. Lujan (W.D. Tex.) Represents A New Leap Outward**



Potential Impacts of
Endangered Species Designation

Arkansas River Shiner
In the Canadian River in Texas

Canadian River Municipal Water Authority provides a municipal water supply to eleven cities and towns (total population: 450,000) from Lake Meredith on the Canadian River about forty miles north of Amarillo. While no specific remedial measures, recovery plan, or restriction of future actions has been designated by the Fish and Wildlife Service for the Arkansas River shiner as an endangered species, it is easy to speculate from information given that some impacts could be expected such as the following:

Operation of Lake Meredith could be affected if the Service should require increased streamflows as part of a recovery plan. Lake Meredith has already been found to have a substantially lower water supply yield than original studies indicated. Further reduction of firm yield would result, making supplies to our member cities even less reliable.

Execution of the Lake Meredith Salinity Control Project would apparently require "consultation" with the Service, with unknown resulting impacts. This Project, which will stop the inflow of salty water to the Canadian River in New Mexico, is absolutely necessary to stop the gradual deterioration of water quality in Lake Meredith.

The Alternate Water Supply Project is supposed to supply water from underground sources, making up the shortfall in yield from the Lake and providing good quality water for mixing to meet quality standards. Our ability to carry out this project could be impacted if use of water from ground water sources is restricted.

Recreation activities at Lake Meredith could be affected should the Service require releases of water to "improve" downstream habitat for the minnows.

Restrictions on pumping ground water for the Ogallala Aquifer for irrigation could occur. Should restrictions reduce pumpage to an amount equal to natural recharge, agricultural production could be reduced by 50 percent or more from the area which provides food and fiber to the rest of the nation and to the world.



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ARKANSAS RIVER SHINER PUBLIC MEETINGS

Testimony by:
 Gary L. Graham
 Chief, Endangered Resources Branch
 January 25, 1995

Thank you for the opportunity to comment on the proposal to add the Arkansas River Basin population of the Arkansas River shiner (*Notropis girardi*) to the federal list of endangered species. I am Dr. Gary Graham, Chief of the Endangered Resources Branch within the Texas Parks and Wildlife Department and I am here to present the Department's position on this proposal.

Our biological evidence does not warrant listing the shiner as endangered in Texas. In 1983, our biologists collected 786 Arkansas River shiners out of a total of 3,141 fish from 34 samples above Lake Merideth on the Canadian River. By comprising 25% of the total sample, the Arkansas River shiner was the second most abundant species in the river. This was during the same time period when most of the Cimarron River populations in Oklahoma were either being, or had already been, lost. In 1990, we recorded 309 individuals (8.6%) of this species out of 3,600 fish taken from 3 samples on the Canadian River near the town of Canadian downstream from Lake Merideth. The relative abundance ranged from 5.9% to 26.6%. We note that because these data were taken from the lower, instead of the upper, portion of the Canadian they cannot be used to show a decline in numbers since 1983. In fact, they show that the shiner was apparently abundant in that part of the river as recently as 1990.

Graham

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With respect to habitat, Joe Kraai, a fisheries biologist in our Department who has studied the fish in the Canadian River for over 20 years, states that the river continues to be a healthy prairie river with intense periods of flooding and drought. This could be one of the reasons that the Texas population of the Arkansas River shiner appears neither threatened nor endangered.

In order to gain more information, we are about to initiate an effort to monitor the species within the Canadian River. We will seek data on why the species is doing better in Texas and assess the possible threats. We will, of course, share the results of these efforts with staff in the U.S. Fish and Wildlife Service (Service) and other affected state agencies to further conserve the species in other parts of its range.

In addition to the lack of more convincing biological data for Texas, we are opposed to this federal listing because our Department has not had an opportunity to cooperate with landowners and other state agencies to conserve the species using ecosystem based, non-regulatory approaches. We note that the Service recently published a news release in which they agreed to work with states and other federal agencies to take appropriate conservation action for species that have been identified as candidates for listing, thus potentially avoiding the need to list these species. The Service, however, has not formally contacted our Department about this listing and has not sought voluntary conservation efforts prior to listing.

Instead of listing this fish, we recommend that the Service promote an interstate Arkansas River shiner conservation team that would work toward cooperative, voluntary approaches to conserve this species. This approach would be similar to the one we are currently pursuing for the conservation of the swift fox, which thanks to efforts by biologists in our Department as well as the Texas Department of Agriculture and other agencies, may conserve and preclude the listing of this mammal. Such a cooperative approach for the shiner would put into practice what Secretary Babbitt has stated is the preferred approach to the conservation of candidate species.

That concludes my comments. If you have questions, I would be glad to try and answer them.

Summary of proposed rule as published in the *Federal Register* on August 3, 1994, page 39532:

"The U.S. Fish and Wildlife Service (Service) proposes to list the Arkansas River basin population of the Arkansas River shiner (*Notropis girardi*) as an endangered species under the authority of the Endangered Species Act of 1973 (Act), as amended. The Arkansas River shiner is a small fish found in the Canadian (South Canadian) River in New Mexico, Oklahoma, and Texas; and the Cimarron River in Kansas and Oklahoma. A non-native introduced population occurs in the Pecos River in New Mexico; however, protection for this population is not under consideration. The Arkansas River basin population is threatened by habitat destruction and modification from stream dewatering or depletion due to diversion of surface water and excessive groundwater pumping, water quality degradation, and construction of impoundments. Incidental capture of the Arkansas River shiner during pursuit of commercial bait fish species, and competition with the introduced Red River shiner (*Notropis bairdi*) may also contribute to reduced population sizes. This proposal, if made final, will implement Federal protection provided by the Act for *Notropis girardi*. Critical habitat is prudent but not currently determinable."

"Recent surveys for the Arkansas River shiner were conducted at 155 localities within the Arkansas River Basin (Larson et al. 1991). Fish collections were made at 128 of 155 localities; the remaining 27 sites were dry. The surveys resulted in the capture of 1,455 Arkansas River shiners from 23 localities: 14 in Oklahoma, 5 in Texas, and 4 in New Mexico. No Arkansas River shiners were captured in Kansas. The decline of this species throughout its historic range may primarily be attributed to inundation and modification of stream discharge of impoundments, channel desiccation by water diversion and excessive groundwater pumping for agriculture, stream channelization, and introduction of non-native species."

"Construction and operation of Ute and Conchas reservoirs in New Mexico, Lake Meredith in Texas, and Eufaula Reservoir in Oklahoma altered or eliminated sections of riverline habitat and diminished the range of Arkansas River shiners within the Canadian River. Eufaula Reservoir isolated Canadian River populations from the Arkansas River and, in combination with Lake Meredith and Ute Reservoir, confined Arkansas River shiners to two restricted segments of the Canadian River, one between Ute Dam and the upper reaches of Lake Meredith and the other below Lake Meredith to the upper reaches of Eufaula Reservoir. The reservoirs function as barriers, significantly

inhibiting dispersal and interchange between the two segments."

"In Texas, withdrawals of groundwater in the Canadian River Basin were as much as 33 times higher than the annual natural recharge in 1989, and irrigation return flows in the Basin are negligible (Texas Department of Water Resources 1984). When groundwater is pumped faster than it is restored, water tables drop, channel seepage ceases, and streams cease to flow. Under these conditions, suitable habitat to support Arkansas River shiner populations is non-existent."

"Dewatering and reduced base flows because of groundwater and surface water withdrawals is considered a significant, ongoing threat to the Arkansas River shiner in southwestern Kansas, northwestern Oklahoma, and the Texas panhandle (Larson et al, 1991. Cross et al, 1985)."

"Water quality in the Canadian River in Texas generally declines as the river flows eastward. The Canadian River traverses oil and gas producing areas and receives municipal sewage effluent and manufacturing return flows, all of which degrade water quality (Texas Department of Water Resources 1984). Water quality degradation is believed to have suppressed Arkansas River shiner populations within affected reaches of the Canadian River. Water quality within the Canadian River begins to improve as the river flows through the sparsely populated counties in western Oklahoma."

"The proposed Lake Meredith Salinity Control Project is designed to control brine seeping into the Canadian River from a brine aquifer in New Mexico. The project could have an effect on the quantity and quality of flow in the Canadian River between Ute Dam near Logan, New Mexico and Lake Meredith in Texas. The impacts of this project on Arkansas River shiner populations have not yet been determined. Arkansas River shiner populations in this 219 km (136 mi) reach of the Canadian River are isolated from other populations by Ute and Meredith reservoirs. Flow reductions in this reach could severely deplete, or possibly extirpate, these populations."

"Listing under the Act would provide additional protection and encourage active management through "Available Conservation Measures" discussed below. The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species in determining to propose this rule. Based on this evaluation, the preferred action is to list the Arkansas River basin population of the Arkansas River shiner as endangered. Endangered status, which means that the species is in

danger of extinction throughout all or a significant portion of its range, is appropriate for the Arkansas River shiner because of its significantly reduced range, including the apparent extirpation of the shiner in Arkansas, Kansas, and throughout much of its historic range in Oklahoma. Threatened status does not appear appropriate considering the extent of the species' population decline and the vulnerability of the remaining populations."

Critical Habitat

"Section 4(a)(3) of the Act, requires that, to the maximum extent prudent and determinable, the Secretary propose critical habitat at the time the species is proposed to be listed as endangered or threatened. The Service finds that designation of critical habitat is not presently determinable for this species. The Service's regulations (50 CFR 424.12(a)(2)) state that critical habitat is not determinable if information sufficient to perform required analyses of the impacts of the designation is lacking or if the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat."

"Arkansas River shiners occur at scattered locations throughout the Canadian River. Specific habitat features, such as substrate composition, water depths, and water velocities, preferred by Arkansas River shiners are unknown and data explaining the distribution and abundance of Arkansas River shiners within a given segment of stream are lacking. Without this information, designation of critical habitat is not possible because the Service cannot adequately determine the precise constituent elements within specific areas that are essential to the survival and recovery of the Arkansas River shiner. The Service has initiated studies, funded under the provisions of Section 6(d) of the Act, which will determine and characterize the specific physical habitat requirements of the Arkansas River shiner."

Available Conservation Measures

"Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and authorizes recovery plans for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below."

"Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402. Section 7(a)(4) requires Federal agencies to confer informally with the Service on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service."

"A number of Federal agencies have jurisdiction and responsibilities potentially affecting the Arkansas River shiner, and Section 7 consultation may be required in a number of instances. Federal involvement is expected to include the Bureau of Reclamation's proposed Lake Meredith Salinity Control Project and Corps of Engineers' multi-purpose reservoir operations throughout the Arkansas River Basin. The Corps of Engineers will also consider the Arkansas River shiner in administration of Section 404 of the Clean Water Act. The U.S. Environmental Protection Agency will consider the Arkansas River shiner in the registration of pesticides, adoption of water quality criteria, and other pollution control programs. The U.S. Department of Transportation, Federal Highway Administration, will consider the effects of bridge and road construction at locations where known habitat may be impacted. The U.S. Department of Agriculture, Soil Conservation Service, will be required to consider the effects of structures installed under the Watershed Protection and Flood water Prevention program. The U.S. Forest Service's management actions on the Cimarron and Kiowa National Grasslands may also require Section 7 consultation."

I. Problems with the Endangered Species Act

Implementation of the Act is presently a lose-lose situation -wildlife is losing and people are losing. The Act violates property rights, destroys jobs, increases taxes and is failing to protect wildlife. As written and enforced, the Act constitutes a system of disincentives to landowners to preserve habitat. This all-stick-and-no-carrot approach is not working.

Why is the Act not working?

Here are but a few reasons:

1. The Act states that a listing can be based on the "best available data". The research base for a listing can be adequate or inadequate. There is no minimum standard and no "outside" peer review.
2. There is too little time allowed from petition to listing. One year is not adequate time to support wise decisions based on good research and on local and state inputs.
3. Priorities for protection of species or habitats are not established. Too much money is spent on too few species. There is little if any planning before a species is listed.
4. There is no educational component in the act. Youth and adults are generally unaware of which animals are endangered and which are not. Reactions to the act, both positive and negative are often based on misinformation.
5. There is no end or limit to exposure. If your land is designated as critical habitat for an endangered species, the Fish and Wildlife Service can prohibit you from farming, grazing livestock, cutting timber or building a home. If you try to sell, you will find that your property's value has dropped drastically. The Fish and Wildlife Service will quickly explain that each violation of the Act can result in fines up to \$50,000 and imprisonment up to one year.

6. There are no incentives for the landowner to maintain or create habitat for endangered species. There is no compensation of any kind. In fact the Act is a strong disincentive toward the preservation and well being of all wildlife - both endangered and nonendangered. It is ironic that endangered species are the only wildlife which a landowner must keep and care for. Approximately 97% of Texas and 60% of the United States is privately owned. The good will and co-operation of private landowners is critical to the success of the Act. The consequence of perverse disincentives is that landowners are doing whatever they can to destroy potential habitat. You cannot blame them - their property is their food, home and well being.

I concur with Dr. Larry McKinney of the Resource Protection Division of the Texas Parks and Wildlife Department when he testified to the House Merchant & Marine Committee in October, 1993:

"While I have no hard evidence to prove it, I am convinced that more habitat for listed birds like the Black-Capped Vireo and the Golden-Cheeked Warbler has been lost in Texas since their listing than would have been lost without the Act."

Also, I concur with Michael Bean of the Environmental Defense

Fund as he discussed loss of habitat for the red-cockaded woodpecker:

"--they're (landowners) trying to avoid...problems by avoiding having endangered species on their property. ...It's important to recognize that all of these actions by landowners...are not the result of malice toward the red-cockaded woodpecker, nor the result of malice toward the environment. Rather, they're fairly rational decisions motivated by a desire to avoid potentially significant economic constraints. In short, they're really nothing more than a predictable response to the familiar perverse incentives that sometimes accompany regulatory programs."

The Endangered Species Act is failing because it is the most justifiably feared piece of legislation across rural America.



The
National
Wetlands
Coalition

TESTIMONY

OF

H. LEIGHTON STEWARD

CHAIRMAN, THE NATIONAL WETLANDS COALITION

BEFORE THE

WETLANDS TASKFORCE

AND

ENDANGERED SPECIES ACT TASK FORCE

OF THE

HOUSE RESOURCES COMMITTEE

FEDERAL WETLANDS REGULATORY POLICY

MARCH 13, 1995

Mr. Chairmen and Members of the Endangered Species Act and Wetlands Task Forces, thank you for allowing The National Wetlands Coalition to testify before you today on the Federal wetlands regulatory program. My name is H. Leighton Steward. I am the President, Chief Executive Officer, and Chairman of The Louisiana Land & Exploration Company which owns and manages 600,000 acres of primarily coastal wetlands in Louisiana. I also serve as Chairman of The National Wetlands Coalition.

The National Wetlands Coalition is an incorporated group of approximately 70 companies, Native American groups, associations and local governments that represent a cross-section of the community that is subject to regulation by the Section 404 permitting program. A list of the members of the Coalition and the Statement of Principles that we support are attached as Attachments 1 and 2. We recognize the importance of our nation's functioning wetlands base and support the goal of "no overall net loss of wetlands" when expressed in terms of functions and values rather than acres. We believe, based on recent information released by the Natural Resources Conservation Service and the Corps of Engineers, that the nation is much closer to achieving the stated goal of "no overall net loss of wetlands" rather than the earlier reported continuing annual loss of 290,000 acres of wetlands, which we believe to be a totally erroneous figure.

Mr. Chairmen, the Coalition strongly supports, Title VIII of H.R. 961, the Comprehensive Wetlands Conservation and Management Act of 1995, as the program that can achieve the nation's wetlands conservation goals consistent with our nation's tradition of respecting the property rights of individuals, our nation's need for

continued economic growth and the maintenance of strong local tax bases. Title VIII is similar to H.R. 1330 from the 103rd Congress, the Comprehensive Wetlands Conservation and Management Act of 1993, which was sponsored by Congressman Jimmy Hayes (D-LA) and 170 other Members of the House representing 40 states.

THE PROBLEM WITH THE CURRENT SECTION 404 PERMITTING PROGRAM:

Evolution of the Program:

Mr. Chairmen, we believe strongly that the current Section 404 program was not designed by Congress, but rather evolved with the inattention and acquiescence of Congress. Section 404 of the Federal Water Pollution Control Act of 1972 provided a permitting program for a very specific type of pollution: the discharge of "dredged or fill material" into the "navigable waters, at specified disposal sites." The Act defined "navigable waters" as the "waters of the United States, including the territorial seas." The word "wetlands" does not appear anywhere in the statute or legislative history and it is doubtful that Congress contemplated the current program in 1972. Instead, Federal court decisions in United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974) and Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975), began the expansion of the term "navigable waters" to extend "over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution." Callaway, at 686.

The Callaway case triggered a several year effort by the Corps to arrive at an acceptable description of the term "waters of the United States," which included

various categories of wetlands. The evolution of the program continued as Congress debated the Clean Water Act of 1977. As the debate unfolded over the Clean Water Act, efforts to curb the growing jurisdictional reach came close to succeeding in both the House and Senate, but failed. In the end, Congress reauthorized the Section 404 program without taking decisive action on the jurisdictional reach of the program, but instead incorporated the concept of "general permits" to aid the Corps in its implementation of the program.

Unfortunately, Congress has not returned to this debate since 1977. Meanwhile, in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985), the Supreme Court upheld the expansive definition of "waters of the United States" to include infrequently flooded "adjacent wetlands." The Court noted that the Congress had rejected efforts to restrict the Corps definition of "waters of the United States" during the Clean Water Act debate in 1977. Finally, the definition of Federal jurisdictional wetlands may have reached its apex with the release of the 1989 Federal Manual for Identifying and Delineating a Wetland.

While the reach of the program was evolving ever more broadly, access to Section 404 permits was becoming more restrictive. On December 24, 1980, as President Carter was leaving office, the Environmental Protection Agency issued the Section 404(b)(1) guidelines which established the current "avoidance" permitting methodology. In 1988, the U.S. Court of Appeals for the Second Circuit in Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988), cert. denied 109 S.Ct. 1556 (1989)

upheld EPA's interpretation of the "practical alternatives test," under which the permit applicant bears the heavy burden of clearly demonstrating that practical alternatives to the proposed project having less environmental impact do not exist. On February 7, 1990, in a Memorandum of Agreement between the Corps of Engineers and the Environmental Protection Agency, the Corps agreed to employ the strict "sequencing" methodology of the EPA in determining whether a Section 404 permit may be issued. Attached to this statement as Attachment 3 is a brief chronology of the history of the evolution of Federal wetlands regulation.

The Major Problem with the Section 404 Program:

The evolution of the Section 404 program into a very broad and rigid regulatory program has occurred over the last 17 years without policy guidance from the elected representatives of our nation. The result is the major problem that lies before the Congress today: approximately 75 million acres of privately owned land is being regulated as "wetlands" by two federal agencies, the Corps and the EPA, with the objective of "avoiding" all but the most minor alterations on that land. Some of that land is clearly identifiable by the public as wetlands, while other land can be identified as such by only the most discriminating and highly trained wetlands scientists. The result is a major conflict between landowners and environmentalists and the private property rights backlash that first materialized on the floor of the House during consideration of the National Biological Survey legislation in October,

1993 and perhaps reached its apex in the recent floor debate in the House over H.R. 925, the Private Property Protection Act of 1995.

Mr. Chairmen, the Coalition believes strongly that the Section 404 program must be reformed to reduce the conflict between our nation's environmental goals and economic and property ownership goals. We believe that this environmental program, like the Clean Air Act, must evolve away from primary reliance on the "central command and control" model of regulation to a more incentives-based program. We believe that Title VIII of H.R. 961 and H.R. 1330, the Wetlands Conservation and Management Act of 1993, are the proper Federal Wetlands regulatory programs for the nation.

SPECIFIC RECOMMENDATIONS OF THE NATIONAL WETLANDS COALITION:

**The Federal Wetlands Regulatory Program
Must Recognize the Legitimate Interests of Private Landowners.**

The dominant reality of the Section 404 program is that 75% of the "wetlands" that are being regulated are privately owned. Often this land does not even appear to the average citizen to be "wet." Congress must ensure that the program minimizes adverse impacts on the value, use and enjoyment of this privately owned property.

The Coalition believes strongly that the goals of the program should specify that the national goal of "no overall net loss of wetlands functions and values" must be achieved consistent with the national goals of continued economic growth, strong local tax bases and the security of our citizens in the ownership, use and

enjoyment of their privately owned property. The Coalition believes that the Secretary of the Army and the Administrator of the EPA, if the EPA remains involved in the program, must be directed to implement the program in a manner that will have the least possible adverse impacts on the value, use and enjoyment of privately owned property, the local, state and national economies and local tax bases.

Finally, it is inevitable that the interests of some landowners will be required to give way to the overall national goal of wetlands conservation. Mr. Chairmen, to date, the United States Claims Court has ruled in four cases that the denial of a Section 404 permit constituted a "taking" requiring "just compensation." In at least two additional cases, the most recent involving the Roberges of Maine, the federal government has settled a "taking" claim by providing compensation to the plaintiffs. These cases, except for the Roberge case, are discussed briefly in Attachment 4. Enclosed as Attachment 5 is a Washington Post article regarding the Roberge case.

Congress must make clear that when the value, use or enjoyment of privately owned property is "substantially diminished" by operation of the Section 404 program, the Federal government will compensate the landowner for his or her land. Congress must either provide a workable non-judicial mechanism for obtaining this compensation or open the local Federal district courts, rather than the U.S. Claims Court alone, to these claims. Congress must also provide that if the citizen prevails

against the government, the government must pay reasonable attorneys fees and the cost of the litigation.

Definition of Federal Jurisdictional Wetlands:

The Coalition believes that Congress, rather than the agencies, must define the wetlands that are to be regulated by the Federal government. With 75% of the nation's wetlands in private ownership, the reach of this program is too important a decision to be delegated to Federal judges and Federal bureaucrats that are not directly accountable to the people.

We believe that the definition of Federal jurisdictional wetlands must require water on the surface for at least 21 days a year. Water on the surface for a period of the year is the best indicator of the presence of wetlands to all but the most sophisticated landowners or land purchasers.

Activities to be Regulated:

The Coalition believes that Congress must designate the specific activities to be regulated and avoid broad, unspecific language, that can be expanded by judicial decision and agency interpretation. The Coalition believes that the drainage, excavation and channelization of wetlands, as well as the "discharge of dredged or fill material" into a wetlands should be regulated.

Single Agency Implementation:

The Coalition believes strongly that only one agency should be responsible for the implementation of the program. The Corps has the largest staff

of field personnel trained in the implementation of this program. The Coalition encourages Congress to consolidate the Section 404 program under the jurisdiction of the Corps, provide the resources the Corps needs to do the job and hold the Corps accountable. All other agencies, including the EPA, the Fish & Wildlife Service, and the National Marine Fisheries Service, should be reduced to consultative roles only.

Distinguish Between Wetlands Based on Functions and Values:

The Coalition believes strongly that all wetlands are not of equal value, such that certain activities might be appropriate in some wetlands while inappropriate in others. The Coalition encourages Congress to classify wetlands according to value: high, medium and low. Regulate activities in high value wetlands more rigorously than activities in medium and low value wetlands.

Provide an Administrative Appeal Process for Permit Applicants and Landowners who have had their Property Delineated on a Wetland:

Today, despite its significant impact on projects and private property, the Section 404 program has no administrative appeals process for applicants and landowners. In fact, if a landowner has his land delineated as a jurisdictional wetland, the only way the landowner can appeal that decision is to apply for a Section 404 permit (that he may not need or want), have the permit denied, and appeal the decision in court.

We strongly support Section 803(i) of Title VIII which is the administrative appeals process contained in Congressman Mineta's Chairmen's mark from last year's Clean Water Act reauthorization legislation. These provisions are very

similar to those promised by President Clinton in his wetlands reform proposal released on August 24, 1993.

Incorporate Mitigation Banking as a Central Element of the Nation's Wetlands Program:

Compensatory mitigation works. Mitigation banking can be an important tool for the creation, preservation, enhancement and restoration of large areas of wetlands. Moreover, private mitigation banks can allow individuals and companies to profit from environmentally sound activities -- the best incentive for achieving the nation's environmental goal.

Allow States and Local Governments to Implement Wetlands Permitting Programs that are Tailored to Their Situations:

Congress has intended, since the enactment of the Federal Water Pollution Control Act of 1972, for the Section 404 program to be delegated to the states. Under the rigid "delegation" rules that have been adopted by the EPA, only two states have qualified for the program: Michigan and, only recently, New Jersey.

Congress should allow states and localities to assume the Section 404 permitting program under more flexible rules that allow the states to design programs that are tailored to their environmental and economic situations. Additionally, while the states have the program, no Federal agency should retain the power to veto a state permitting decision, as is allowed under current EPA rules. States and localities should also have the flexibility to develop programs that will achieve the national goal

of "no overall net loss of wetlands" without requiring them to adopt exactly the same provisions and standards as the Section 404 program.

Maintain and Expand the Use of General Permits:

Routine, incidental and minor wetlands altering activities should continue to be covered by the current general permit program and additional general permits should be developed where warranted.

Untangle Agricultural Activities from the Section 404 Program:

Agriculture is subject to both the Swampbuster program of the Food Security Act of 1985 and the Clean Water Act's Section 404 program, which has caused significant confusion and undue hardships. Congress should untangle agricultural activities from coverage under the Section 404 program and make the Natural Resource Conservation Service the lead agency with respect to the delineation of agricultural lands.

Mapping and Public Notice:

Congress must ensure that the nation's Federal jurisdictional wetlands are identified on maps and that these maps are posted in county and parish court houses near the property records, when such maps may become available. In the meantime, Congress must direct the Corps to post notices about the program in the court houses of every county and parish where Federal jurisdictional wetlands may exist.

Areas with Special Wetlands Problems:

At least two areas of our nation are dominated by Federal jurisdictional wetlands: Alaska and south Louisiana. Congress must recognize the realities of these areas and provide special rules that will allow continued human activity in these and similar areas while encouraging conservation, restoration and enhancement of overall wetlands functions and values.

Mr. Chairmen, thank you for the opportunity to appear before you today. The members of the Coalition encourage the Task Force, the full committee and the Congress to seize the current opportunity to develop a wetlands program that can achieve the national goal of "no overall net loss" of wetlands functions and values while earning the support and cooperation of the regulated community.

THE NATIONAL WETLANDS COALITION

MEMBERSHIP

February 15, 1995

ADAM'S RIB RECREATIONAL AREA

Eagle, Colorado

AKT DEVELOPMENT, INC.

Sacramento, California

ALLEGHERY POWER SYSTEM, INC.

New York, New York

AMERICAN FARM BUREAU FEDERATION

Washington, D.C.

AMERICAN PETROLEUM INSTITUTE

Washington, D.C.

AMERICAN ROAD & TRANS. BUILDERS ASSOC.

Washington, D.C.

ARCO ALASKA

Anchorage, Alaska

ARCTIC SLOPE REGIONAL CORPORATION

Barrow, Alaska

AUDUBON INSTITUTE

New Orleans, Louisiana

BERRY BROS. GENERAL CONTRACTORS, INC.

Berwick, Louisiana

BP EXPLORATION (ALASKA) INC.

Anchorage, Alaska

CHEVRON U.S.A. INC.

San Francisco, California

CHINA CLAY PRODUCERS ASSOCIATION

Atlanta, Georgia

CONSOLIDATED NATURAL GAS CO.

Pittsburgh, Pennsylvania

ENTERGY CORPORATION

New Orleans, Louisiana

EXXON COMPANY, U.S.A.

Houston, Texas

FINA OIL & CHEMICAL COMPANY

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New Orleans, Louisiana

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GEORGIA-PACIFIC CORPORATION

Atlanta, Georgia

HOUMA-TERREBONNE CHAMBER OF COMMERCE

Houma, Louisiana

HUNT OIL COMPANY

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INTERNATIONAL COUNCIL OF SHOPPING CENTERS

Alexandria, Virginia

INTERSTATE NATURAL GAS ASSOCIATION

Washington, D.C.

KERR-MCCOEE CORPORATION

Oklahoma City, Oklahoma

LA FOURCHE PARISH

Thibodaux, Louisiana

LAS CONCHAS PARTNERSHIPS

Slidell, Louisiana

THE LOUISIANA LAND & EXPLORATION COMPANY

New Orleans, Louisiana

LOUISIANA LANDOWNERS ASSOCIATION, INC.

Franklin, Louisiana

MISSISSIPPI GULF COAST WETLANDS COALITION

Pascagoula, Mississippi

MOBIL EXPLORATION & PRODUCING, U.S. INC.

Houston, Texas

THE MORGAN CITY HARBOR & TERMINAL DISTRICT

Morgan City, Louisiana

MURPHY EXPLORATION & PRODUCTION COMPANY

New Orleans, Louisiana

MUNICIPALITY OF ANCHORAGE

Anchorage, Alaska

NANA REGIONAL CORPORATION

Kotzebue, Alaska

NAT'L ASSN. OF HOMEBUILDERS

Washington, D.C.

NATIONAL ASSOCIATION OF INDUSTRIAL OFFICE PARKS

Herndon, Virginia

NATIONAL ASSOCIATION OF REALTORS

Washington, D.C.

NAT'L ASSN. OF STATE DEPARTMENTS OF AGRICULTURE

Washington, D.C.

NATIONAL COTTON COUNCIL

Memphis, Tennessee

NATIONAL STONE ASSOCIATION

Washington, D.C.

NATIONAL UTILITY CONTRACTORS ASSOCIATION

Arlington, Virginia

NATURAL GAS SUPPLY ASSOCIATION

Washington, D.C.

NORTH SLOPE BOROUGH

Barrow, Alaska

OCCIDENTAL OIL & GAS CORPORATION

Tulsa, Oklahoma

OLETHORPE POWER CORPORATION

Tucker, Georgia

PANHANDLE EASTERN CORPORATION

Houston, Texas

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Tulsa, Oklahoma

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Houston, Texas

SUN COMPANY, INC.

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T. BAKER SMITH & SON, INC.

Houma, Louisiana

TENNECO GAS

Houston, Texas

TERREBONNE PARISH CONSOLIDATED GOV'T

Houma, Louisiana

TEXACO U.S.A.

Houston, Texas

UNION PACIFIC RESOURCES COMPANY

Fort Worth, Texas

UNICAL CORPORATION

Los Angeles, California

U.S. SILICA COMPANY

Berkley Springs, West Virginia

VIRGINIA PENINSULA CHAMBER OF COMMERCE

Hampton, Virginia

WALDEMAR S. NELSON & CO., INC.

New Orleans, Louisiana

WALK, HAYDEL AND ASSOCIATES, INC.

New Orleans, Louisiana

THE WILLIAMS COMPANIES, INC.

Tulsa, Oklahoma

THE ZAMIAS GROUP

Pittsburgh, Pennsylvania

MICHAEL ZUNICH & ASSOCIATES

North Ridgeville, Ohio

**STATEMENT OF PRINCIPLES
THE NATIONAL WETLANDS COALITION**

The National Wetlands Coalition is a geographically and economically diverse group of public and private sector entities that have joined together to participate in the efforts of the Congress and the Administration to establish a comprehensive policy for effective conservation and management of the Nation's wetlands. The National Wetlands Coalition will support the adoption of the specific programs and policies that advance the objectives of wetlands conservation, consistent with the following principles:

1. THE CONGRESS OF THE UNITED STATES AND THE PRESIDENT SHOULD ESTABLISH A COMPREHENSIVE FEDERAL PROGRAM FOR MANAGING THE NATION'S WETLANDS RESOURCE BASE IN A MANNER THAT EFFECTIVELY AND SENSIBLY ACCOMMODATES THE COMPETING, LEGITIMATE DEMANDS FOR CONSERVATION AND USE OF WETLANDS RESOURCES.
2. GIVEN THE NUMBER AND DIVERSITY OF PEOPLE AFFECTED, AND THE ECONOMIC AND ENVIRONMENTAL IMPORTANCE OF THE WETLANDS RESOURCE BASE, A COMPREHENSIVE FEDERAL WETLANDS POLICY SHOULD BE THE PRODUCT OF A NATIONAL CONSENSUS-BUILDING PROCESS.
3. "NO OVERALL NET LOSS OF WETLANDS VALUES" IS AN APPROPRIATE GOAL FOR ACHIEVING THE EFFECTIVE CONSERVATION OF SIGNIFICANT WETLANDS VALUES AND FUNCTIONS. THIS GOAL SHOULD BE PURSUED BY IMPLEMENTATION OF A VARIETY OF THE REGULATORY AND NONREGULATORY PROGRAMS DESIGNED TO: CONSERVE THE HIGHEST VALUE WETLANDS; ENSURE THAT DEVELOPMENT ACTIVITIES IN WETLANDS CONSERVE WETLANDS VALUES AND FUNCTIONS TO THE MAXIMUM EXTENT PRACTICABLE; ELIMINATE OR STREAMLINE PROCEDURES FOR USE OF WETLANDS OF MARGINAL RESOURCE VALUE; AND, PROVIDE INCENTIVES FOR PRIVATE WETLANDS CONSERVATION EFFORTS.
4. PROTECTION OF THE NATION'S HIGH-VALUE WETLANDS, AND RESTORATION OF WETLANDS GENERALLY, WILL REQUIRE AGGRESSIVE NONREGULATORY PROGRAMS INCLUDING PUBLIC ACQUISITION AND INCENTIVES FOR SET-ASIDES AND FOR RESTORATION ACTIVITIES. FEDERAL FUNDING REQUIRED FOR SUCH PROGRAMS SHOULD BE FROM THE BROADEST SOURCES POSSIBLE WITH NO SINGLE INDUSTRY REQUIRED TO BEAR A DISPROPORTIONATE SHARE OF THE COST.
5. SUBSTANTIAL REFORM OF THE SECTION 404 PERMITTING PROCESS IS NECESSARY TO CONSOLIDATE AGENCY RESPONSIBILITY, TO EXPEDITE ROUTINE PERMITTING, TO INCREASE FLEXIBILITY IN THE PROGRAM, AND TO PROVIDE GREATER PREDICTABILITY IN ALL CASES. CRITICAL TO THE ESTABLISHMENT OF A SENSIBLE PERMITTING PROCESS IS THE RECOGNITION THAT ALL WETLANDS ARE NOT OF EQUAL VALUE AND THAT THE LEVEL OF REGULATION AND MITIGATION IMPOSED SHOULD VARY DEPENDING UPON FUNCTIONS AND VALUES OF AFFECTED WETLANDS, DEGREE AND DURATION OF IMPACT, AND THE SURROUNDING LAND USE.

07/19/90

**A BRIEF CHRONOLOGY OF THE
HISTORY OF FEDERAL WETLANDS REGULATION**

March 13, 1995

- * From the early 19th century through the mid-20th century, federal policy favored the draining and/or filling of wetlands areas.
- * In the late 19th century, Congress enacted the Rivers and Harbors legislation (the principal act passed in 1899). This legislation prohibited unauthorized obstructions to navigable waters and included a provision (termed the Refuse Act) that prohibited the discharge of refuse into any navigable water or tributary thereof, where navigation may be impeded or obstructed.
- * In the mid-20th century, the Refuse Act became more widely viewed as a measure for controlling pollution. Two Supreme Court decisions in the 1960's sanctioned the use of the Act to prohibit pollution in navigable waters.
- * In 1970, a United States Court of Appeals upheld the use of the Refuse Act to control pollution even where there was no effect on navigation (*Zabel v. Tabb*).
- * In December 1970, President Nixon issued Executive Order No. 11574, directing the implementation of a permit program under the Refuse Act.
- * The following year a district court held that the regulations implementing the program were invalid (*Kalur v. Resor*).
- * In 1972, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), which includes section 404 governing the discharge of dredged or fill material into navigable waters at specified disposal sites.
- * In 1975, a district court interpreted "navigable waters" to include waters not limited by the traditional tests of navigability but rather extends jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution (*NRDC v. Callaway*).
- * In July 1975, the Corps issued new regulations implementing the FWPCA. These regulations established a lengthy classification of jurisdictional waters, which included:
 - * intrastate lakes, rivers, and streams landward to their ordinary high water mark and up to their headwaters that are utilized by interstate travels for water related recreational purposes, for the removal of fish sold in interstate commerce, for industrial purposes by industries in interstate commerce or in the production of agricultural commodities sold or transported in interstate commerce;

- * freshwater wetlands, marshes, swamps, shallows and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation, where these areas are periodically inundated and are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction; and
 - * other waters the Corps determines necessitate regulation for the protection of water quality as expressed in the guidelines--such as intermittent rivers, streams, tributaries and perched wetlands that are not contiguous or adjacent to previously identified navigable waters.
- * In May 1977, President Carter issued Executive Order No. 11990, which addressed the protection of wetlands on federal property.
 - * In 1977, the Corps issued revised regulations further clarifying its jurisdiction over navigable waters, including isolated lakes and wetlands, intermittent streams, prairie potholes, and certain other waters. These revised regulations included a specific discussion of the Corps' jurisdiction over wetlands.
 - * In December 1977, Congress amended the FWPCA, retaining the scope of regulatory authority over all discharges of dredged or fill material into any of the nation's waters.
 - * In September 1979, the Attorney General issues an opinion that the Administrator of the Environmental Protection Agency ("EPA"), rather than the Secretary of the Army, has the final administrative authority to interpret the meaning of the term "navigable waters."
 - * In 1985, the EPA clarified federal jurisdiction over isolated wetlands used by migratory birds.
 - * In 1985, the Supreme Court upholds regulation of adjacent wetlands (*United States v. Riverside Bayview Homes, Inc.*).

**VanNess
Feldman**
ATTORNEYS AT LAW

September 29, 1994

**Takings Cases Involving the Denial of Section 404
Wetlands Permits Where Just Compensation
Has Been Awarded**

There have been a number of cases litigated in the U.S. Court of Federal Claims (Claims Court) that involve "takings" claims for denial of Clean Water Act (CWA) § 404 wetlands permits. Regulatory taking actions arise frequently in the wetlands context, since a permit-denied wetland may have little economic use. Of the cases litigated, five have resulted in decisions against the government. Of these five, four claims have resulted in a decision awarding compensation for the plaintiff (*Florida Rock*, *Loveladies Harbor*, *Formanek*, and *Bowles*), and one has ended in settlement (*Beuré Co.*). Of the four awarding compensation for the plaintiff, one may be reviewed by the Supreme Court (*Loveladies*), and one has been vacated and remanded to the Claims Court, with the Plaintiff also requesting review by the Supreme Court (*Florida Rock*). In cases that awarded compensation, attorney's fees have been awarded to the plaintiff.

Florida Rock Industries, Inc. v. United States

In *Florida Rock Industries, Inc. v. United States*, 21 Cl. Cl. 161 (1990), the plaintiff was denied a permit to quarry 98 acres of its 1560-acre wetland. Florida Rock had purchased the property in 1972 for mining purposes. Shortly thereafter, Congress enacted the Federal Water Pollution Control Act which included Section 404, which requires a permit for the "discharge of dredged or fill material." In 1978, the plaintiff applied for a CWA § 404 permit to mine 98 acres of its tract. The permit was denied in 1980 and the Claims Court found, in 1990, that the plaintiff had suffered a taking. The court found that the denial of the discharge permit denied the plaintiff the economically viable use of its property. Damages were awarded in the amount of \$1,029,000. On appeal, this decision was vacated and remanded by the Federal Circuit in March, 1994, to examine the diminution in fair market value of the property and to determine if sufficient reduction had occurred to require just compensation. Florida Rock Industries has filed a request with the Supreme Court to review the decision of the appellate court.

Loveladies Harbor v. United States

In *Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994), the appellate court affirmed the decision of the Claims Court that the denial of a federal wetlands permit under § 404 of the CWA was a taking requiring just compensation. The wetlands permit was for 12.5 acres of land for which a state permit had been issued. The 12.5 acres was part of an original 250-acre tract of land acquired by Loveladies in 1958, the majority of which was developed before the CWA was passed. The Claims Court awarded Loveladies \$2,658,000 in compensation.

The United States Court of Appeals for the Federal Circuit based its analysis on three criteria: whether there was a denial of economically viable use of the land as a result of the permit denial; whether Loveladies had "distinct investment-backed expectations;" and whether the permit denial "under controlling law," exceeded the government's authority to control common law nuisances. The court focused its analysis on the first criteria of loss of economically viable use of the property, but first had to consider whether to examine loss of value of the entire 250-acre parcel, or just the 12.5 acres (the "parcel" as a whole issue). The Court limited its analysis to the 12.5-acre parcel for which the permit was sought and found a 99 percent loss of value, which constituted a taking of the owner's interest in that parcel. This decision raises questions as to whether courts in the future will examine the "parcel as a whole" or a portion of the parcel to determine whether a taking has occurred.

The Department of Justice has requested a rehearing and suggested a rehearing in banc. The government argues in its request for rehearing that this case cannot involve a taking because the government has an inherent interest with regard to navigable waters that constitutes a pre-existing limitation upon title. If there is a pre-existing limitation on the title, then the proscribed use is not part of the "bundle of rights" of property ownership that run with the title and a takings may not occur.

Formanek v. United States

The Claims Court ruled in *Formanek v. United States*, 18 Cl. Ct. 785 (1989), that a denial by the Army Corps of Engineers of the landowner's application for a § 404 permit, which was needed to build an access road for proposed development, had a severe adverse effect on the economic value of the property. The court said that the landowners successfully showed that the highest and best use of the property before the Corps denied the § 404 permit was as a multi-lot industrial development, which the court decided had a fair market value of \$933,921. The landowners convinced the court that the denial of the permit to fill the wetlands was the only impediment to its best use. The court rejected the government's argument that there were other economically workable possibilities available for the land, and found that the uses suggested by the government were improbable.

Bowles v. United States

In *Bowles v. United States*, 1994 WL 102117 (Fed. Cl. March 24, 1994), the Claims Court awarded Harry Bowles \$55,000, plus interest, court costs and legal fees to compensate him for the denial of a § 404 permit for land he wanted to fill on a small lot in a Texas subdivision. The permit was necessary in order to put in a septic tank and build a home. The court held that the landowner's investment-backed expectations were reasonable, because a reasonable

-3-

investor would have had no notice of Corps jurisdiction within the subdivision. Just compensation was required for the owner, because the permit denial deprived him of all economically beneficial or productive use of his land.

Beuré-Co. v. United States

In *Beuré-Co. v. United States*, 16 Cl. Ct. 42 (1988), the parties reached a settlement after a claim by the plaintiff that the Army Corp's denial of plaintiff's \$ 404 permit constituted a taking. Plaintiff had purchased for \$30,000 approximately 25 acres of undeveloped wetland in a suburban community in Minnesota. In 1977, the State condemned 11.6 acres for nature trails, expansion of a highway and construction of a new bridge. The remaining 13 acres were classified as wetlands. In 1984, plaintiff applied for a \$ 404 permit to fill and construct on the 13-acre site. This permit was denied in 1985. The settlement agreement included \$425,000 in compensation, \$236,818 in interest, and \$100,000 in litigation costs.

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The Washington Post

SATURDAY, DECEMBER 24, 1994

THE NATION'S HOUSING

Couple's Perseverance Pays Off

By Kenneth R. Harney

Gaston Roberge's quiet \$338,000 Christmas-season real estate settlement with the federal government should spread cheer—and hope—to thousands of property owners involved in regulatory disputes with government agencies across the country.

Eighty-one years old, blind in one eye and a victim of several heart attacks, Roberge stood his ground and in mid-December got the Justice Department to do what legal experts say it's never done before: Agree to pay a big settlement for a "temporary regulatory taking" of a citizen's free use of his real estate.

Here's his story—something akin to Kafka does Christmas. Back in 1964, Roberge and his wife, Monique, bought a 2.8-acre piece of land in the coastal town of Old Orchard Beach, Maine. The idea, he said, was to hold onto the property, located 300 feet from the sea, "as an investment for our retirement years, when we wouldn't be earning anything."

In 1975 and 1976 the town installed a new sewage system and, with the Roberges' permission, dumped some excess fill from the job on a low-lying section of the Roberges' land.

Fast forward to 1986. New England's economy was in full boom, and a home builder approached the Roberges with a tantalizing proposal: He'd give them \$440,000 for their 2.8 acres. The Roberges said yes.

Then their nightmare began. The

See HARNEY, E2, Col. 1

U.S. Government Pays Landowners \$338,000 for Denying Property Use

HARNEY, From E1

U.S. Army Corps of Engineers informed the home builder that the lot was a "wetland" under its legal jurisdiction and that the land had been illegally filled. The corps ordered that all the fill from the mid-1970s had to be removed and the procedure that cost from \$50,000 to \$100,000 was to be paid by the builder, said no thanks and backed out of the \$440,000 contract. The Robertes, meanwhile, were stunned.

"No one here had ever even heard of the Corps of Engineers having anything to do with land in this town," he recalled. "And we certainly never thought of our property as a 'wetland.'"

In fact, the corps only received regulatory jurisdiction over property such as the Robertes' lot in July 1977—well after the fill had been brought in by the town.

Gaston Roberte was determined to do whatever was necessary to make the land salable, so he spent \$50,000 on soil experts, lawyers and other consultants to make a formal application for a variance. He was an engineer and a contractor. Little did Roberte know that behind the scenes, corps personnel already had targeted him and Old Orchard Beach for special attention.

An internal memo from a corps field official, brought to public light in subsequent litigation, urged the corps to be tough.

"Roberte would be a good one to squish and set an example," wrote the official. "Old Orchard is heating up these days."

The official signed his name followed by "formerly the Maytag repair man," implying that he hadn't had much to do recently and now needed the action.

In 1991, three years after Roberte filed his application for the variance, the corps rejected his request. It told Roberte, who was then in his

late seventies and short of cash, that before anyone could use the land, he'd have to remove the 28,000 square feet of fill the town had placed in 1975 and 1976.

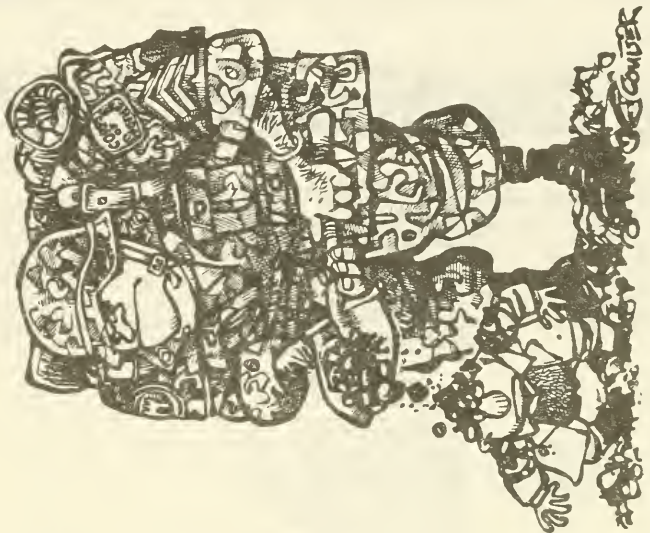
Roberte could have simply thrown in the towel at that point. But, he said, "I was really angry. I knew that this was completely unjust. I decided to keep fighting." This time he contacted the \$448,000 head of a national grass-roots organization called the Fairness to Land Owners Committee, based in Cambridge, Md. She in turn brought in a prominent Washington environmental lawyer, Stanley W. Legro, a former top enforcement administrator for the Environmental Protection Agency, and Bernard N. Goode, a Burke-based engineer who formerly headed the Corps of Engineers' regulatory office.

In the face of all this technical and legal expertise, the corps backed down. By October 1992, it admitted that it had no legal jurisdiction over the Robertes' lot in the first place. The corps letter offered no explanation, no apology, no compensation for the cost of the variance. But the Robertes said the letter was "a new 'tree' of the earlier entanglements—it could be sold without removing the fill."

Great. The only problem was that from 1966 to 1992, New England's—and especially Maine's—real estate market had gone into free fall. Not only was there no builder around who would pay \$440,000 for the lot, there was "nobody who wanted to buy anything," Roberte said.

So with the help of his legal and technical team, Roberte filed suit in 1992 in the U.S. Court of Federal Claims. He charged that the U.S. government, acting through the corps, had unjustly taken away much of the economic value of his property.

The case went to trial in October and was



BY WILLIAM L. GAUDIER

court to the long-suffering Robertes—the Federal Circuit awarded \$338,000.

The case began 17 years. And they plan, Gaston Roberte said, to have a merry Christmas.



Coalition to Restore Coastal Louisiana

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TESTIMONY OF THE COALITION TO RESTORE COASTAL LOUISIANA
TO THE TASK FORCES ON THE ENDANGERED SPECIES ACT AND
WETLANDS
OF THE U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES
BY
MARK DAVIS
EXECUTIVE DIRECTOR
MARCH 13, 1995

My name is Mark Davis and I am the Executive Director of the Coalition to Restore Coastal Louisiana. The Coalition is a broad based organization made up of more than 120 business, civic, church, governmental, environmental, and sportsmen's groups as well as hundreds of individuals dedicated to restoring a sustainable balance to Louisiana's vast but threatened coastal resources. It is a task we have been working on since 1988. We are seeing progress but have not yet turned the corner. It is not an exaggeration to say that the future of those efforts depends to a large extent on the direction national wetlands policy takes during the next decade or so. To make it clear why this is so, let me explain a little bit about coastal Louisiana, the problems it is facing, and what is being done to address them.

The Nature of Coastal Louisiana

Simply put, the geology, biology, and culture of coastal Louisiana are defined by the Mississippi River and the deltas it has built over the years. The eastern half of the Louisiana's coastal zone is actually comprised of deltas created over thousands of years of seasonal flooding by the river. The western half of the coastal zone, or chenier plain, was built in large part by river borne sediments that were transported west by Gulf currents and deposited. The result of this process, the only major deltaic system in North America, was a vast area of coastal wetlands unmatched in size and productivity anywhere in this nation. To put this in perspective consider the following:

- * Coastal Louisiana contains over 40% of the nation's coastal

Turn the Tide on Wetland Loss by the Year 2000!



wetlands in the forty-eight contiguous states.

- * Louisiana's coastal wetlands are an essential part of the single largest fishery in the lower forty-eight states.
- * The delta is a vital nursery and feeding area for millions of the waterfowl that traverse the Mississippi flyway.

The Problems Facing Coastal Louisiana

Despite their vast size, Louisiana's coastal wetlands have proven to be distressingly fragile. In essence, much of coastal Louisiana is disappearing. Over the past several decades, the state has experienced land loss, the conversion of land to open water, in its coastal region ranging from more than 40 square miles per year to the current rate of approximately 25 to 35 square miles per year. This means we are still losing an area roughly the size of a football field every fifteen minutes. This land loss is the result of coastal Louisiana's unique geology coupled with the effects of human activities in the area.

Even under the best of conditions, land tends to be ephemeral stuff in Louisiana's delta. Through compaction and subsidence it, in essence, sinks. Only through the deposition of new sediment from the Mississippi was it possible to offset the losses attributable to compaction and subsidence. Coastal Louisiana is in fact not so much a place as it is a process, a process in which land building must balance land loss. The fundamental problem facing us is that we have lost that balance. Human activities such as levee construction have to a large extent shut down the land building part of the process. Millions of tons of land-building sediment are now dumped into the deep waters of the Gulf of Mexico rather than into the marsh where they could create or stabilize land.

At the same time the land-building process was effectively halted, human activities were also altering or stressing existing wetlands to the point that they have been deteriorating at an unprecedented rate. Thousands of miles of canals and navigation channels have carved up the coastal marshes, changing their hydrology and making them vulnerable to saltwater intrusion. Roads and urban development have claimed wetlands and choked off sources of sediment transport. In sum, at the current rate of change to Louisiana's coastal wetlands, much of the delta will be gone within 100 years and with it will go the fisheries, the habitat, the nesting areas, the storm protection to cities such as New Orleans, a culture, and millions of acres of private property. The nation was reminded by the visit of Hurricane Andrew to both Florida and Louisiana of the tremendous importance a wetland buffer makes. The numbers are now in: \$2.5 billion in Louisiana versus \$20 billion in Florida for a landfall by the same storm at about the same strength.

Solving the Problem

Since its inception the Coalition has worked to restore sustainable balance to Louisiana's coastal system. A balance that accommodates the needs of the natural system with the needs of people who live, work, and play there. Because of changes and investments that have already been made in that system we cannot restore it to what it was. Instead we must restore the functions and values that have been lost or that are threatened.

That work has already begun. Pursuant to the Coastal Wetlands Planning, Protection, and Restoration Act and the state's coastal program millions of dollars are being spent per year on coastal restoration in Louisiana. The scale of these efforts is unprecedented, ranging from vegetated plantings to diverting the Mississippi to create new delta lobes. All of this will take time and commitment, but it can be done. An essential part of that commitment is a national wetlands policy that fosters both appropriate restoration efforts and sustainable use and management of our wetland resources. That is why the Coalition was so pleased to be invited to testify today.

The Elements of an Effective Wetlands Policy

We strongly believe that any national wetlands policy must be rooted in two principles:

1. The delineation of wetlands must be distinct from the wetlands regulatory system. Although the two are related, the conflation of delineation and regulation, as has occurred in much of the wetlands debate over the past two years, only confuses the issue and jeopardizes the futures of our wetland resources and everyone who is served or protected by them. The purpose of delineation is to identify, as objectively as possible, those areas that provide wetland functions and values. The purpose of regulation is to control how those areas are managed and used. This distinction is critical because delineation is essentially a question of fact while regulation is a matter of policy. It would be a fundamental mistake to attempt to legislate a definition of wetlands that is inconsistent with, or unrelated to, the actual functions and values that wetlands provide as some bills have, such as HR 1330. S.2093's deference to the National Academy of Sciences study of wetlands is an encouraging step in the right direction.

2. The regulatory system must be directed at protecting and restoring important wetlands functions and values to meet a national goal of no net loss of wetlands. The regulatory system needs to clearly and unambiguously reflect a policy that recognizes the importance of wetlands and the fact that the value of a particular wetland must be evaluated in the context of its environment. Too frequently we have seen valuable wetlands

destroyed piecemeal because our current regulatory scheme does not effectively consider the cumulative and secondary effects of activities conducted in wetlands. On the other hand, we have seen 200 year old communities that are sinking in the delta that are effectively unable to maintain existing flood control levees because of encroaching wetlands. To the extent that the current system encourages these results it ought to be reformed. To assist you in your efforts to clarify and reform that system we would like to offer the following suggestions:

a. Restoration of wetlands must be made a priority. It is a simple truth in coastal Louisiana and areas such as the Everglades that no regulatory regime that focuses solely on restricting wetland activity can safeguard these vital resources. The seeds of their destruction have already been sown and their survival depends on active restoration efforts. There are no substitutes for such restoration and that fact needs to be clearly reflected in our nation's wetlands policies. S.2093 at least begins to address this need but needs further work. For example, it proposes to create a wetlands restoration pilot program without even acknowledging that such a program, for coastal wetlands, has been created under the Coastal Wetlands Planning, Protection, and Restoration Act. We suggest that S.2093 be amended to reflect, and bolster CWPRA, while providing for the creation of noncoastal wetlands restoration pilot programs.

b. Avoid policy making by anecdote. Regardless of what policy is adopted it will work to someone's disadvantage. The mere fact that someone is unhappy with or inconvenienced by the regulatory system is not proof that the system is unfair or poorly conceived.

c. Do not confuse problems of administration with defects in policy. Many of the complaints about the current wetlands regulatory program deal with delays experienced by applicants for permits. Although some of these delays may reflect fundamental problems with the system, many reflect the fact that inadequate resources have been allocated to the administration of the program. Delays caused by inadequate funding or staffing will not be alleviated by changing the policies upon which the system is based.

d. Increase local involvement in wetland protection. Because wetlands and the problems facing them are not the same everywhere, it is imperative that there be local involvement, along the lines now being proposed for the National Flood Insurance Program, in the development of wetland protection and restoration strategies at the watershed level if they are to be effective in reaching the no net-loss goal. It must be clear,

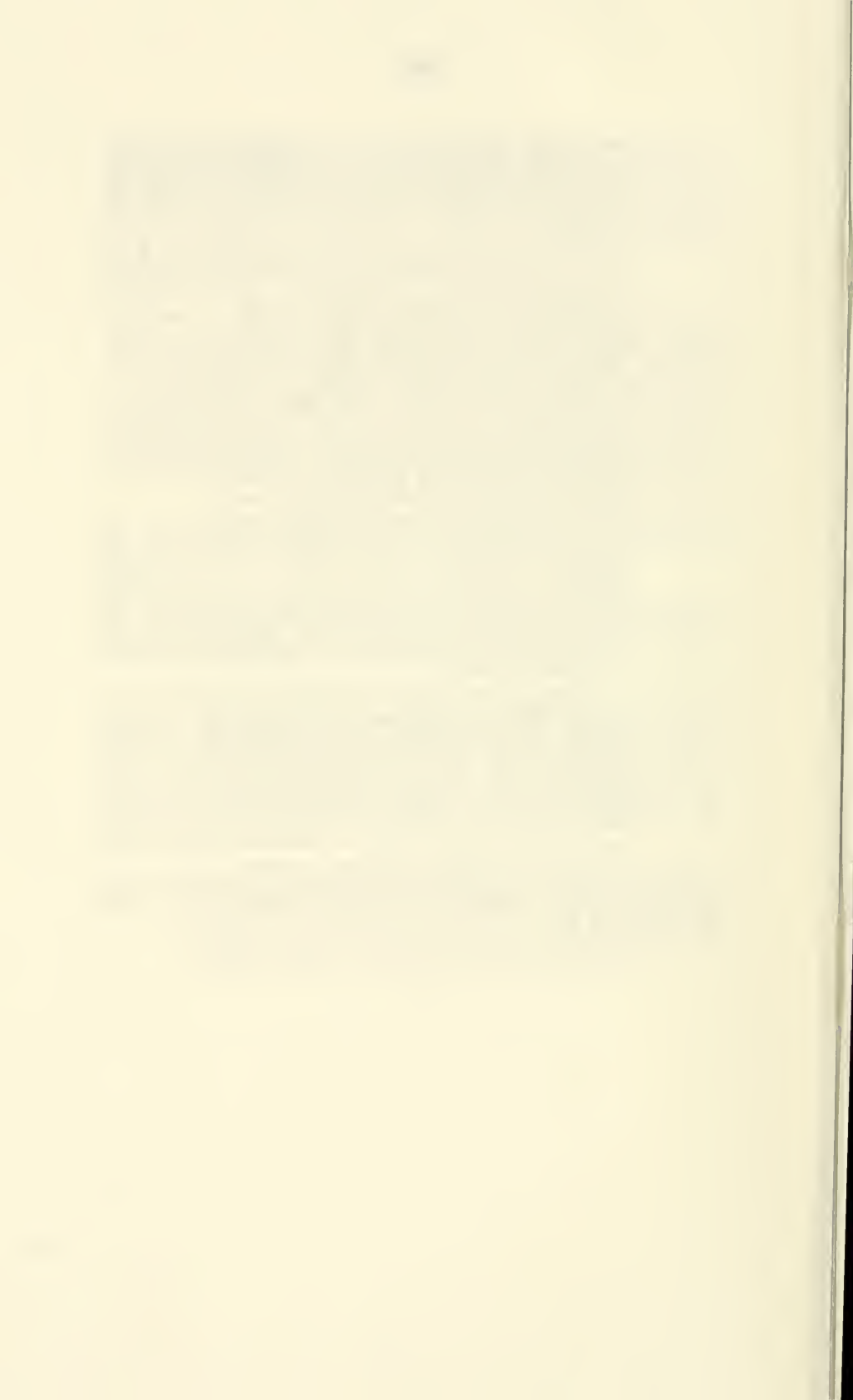
however, that such involvement is intended to inform that process, not to supersede it. The interstate nature of our nation's waterways and watersheds will require the federal government to continue to play the leading role in developing and coordinating our wetlands policies and programs.

e. Avoid the takings quagmire. Wetlands regulations are not any different from any other restrictions on personal activities or land use and should not, in all fairness, be judged by a different standard. In short a taking is a taking is a taking and there is no need or justification for a special rule for wetlands. If the application of a wetland regulation constitutes a taking, adequate laws and procedures exist to protect landowners, although we could support appropriate administrative procedures to expedite the handling of takings claims. Additionally, at least in coastal areas, the extent of private property rights is still the subject of debate. It would be unwise and inappropriate for Congress to preempt the resolution of that state law debate by effectively concluding that any one person's claim of ownership is paramount to the state's.

f. Where a permitted activity does impair or destroy wetland functions and values, mitigation should be required to offset those effects. To the extent possible, mitigation must cover the anticipated cumulative and secondary effects of the project and be done in the same locale and watershed that suffered the impact. To require less would be to allow many of the true costs of wetland activities, such as increased flooding risk, to be passed on to neighboring property owners and communities.

g. Effective enforcement of wetlands laws is essential. One of the greatest weaknesses of the current wetlands program is the absence of any effective, coherent enforcement. It is ironic that a system that is reputed to demand so much of permit applicants demands virtually nothing of them once a permit is issued. To be sure, permits often contain conditions and mitigation requirements, but those provisions are rarely monitored and even more rarely enforced. That lapse not only costs us in terms of lost wetlands but fosters cynicism about the entire regulatory regime.

In closing, I would like to again express the appreciation of the Coalition to Restore Coastal Louisiana for the opportunity to share our views with you.



STATEMENT OF RICKEY MATHERNE

My name is Rickey Matherne. I am a commercial shrimp fisherman. I am part-owner and operator of the *F/V Miss. Santrina* which is a 85 foot steel shrimp trawler. I fish the waters of the Gulf of Mexico from Key West to Brownsville, TX.

I would like to thank the Endangered Species Task Force and the Wetlands Task Force for the opportunity to express some concerns about TEDs and the Endangered Species Act, that is still eating away at this industry like a cancer.

After 5 years of TEDs we still have some old problems, plus new problems with TEDs and enforcement that need to be addressed.

I have bought over 50 TEDs and tried every way possible to get any one of the different kinds of TEDs to work without losing shrimp. Today I am still losing a percentage of my shrimp and worst of all the turtles are still washing up on the beach. Six years ago the shrimp industry was singled out as the demise of the Kemp's ridley turtle.

Today many boats, homes, and cars have been repossessed, lives lost, and broken families have resulted from TED regulations and the Endangered Species Act. It feels as if a train has run over the industry; that is the TED regulations being the train and the Endangered Species Act being the locomotive that doesn't look back.

From the beginning of TEDs the shrimp industry felt that we were not the ones causing more turtle deaths than every other cause, and stand by that today. With 98 percent compliance, why are these turtles still washing up?

Over the years, the relationship between NMFS and the shrimp industry has eroded to complete distrust and no respect. This stems mainly from the way TED regulations have been handled. There has also been a problem with NMFS at the upper levels in working with the industry towards cooperative and working solutions.

I can recall one of the personal experiences I had with NMFS. I was one of the first to let a NMFS specialist install a TED in my net, and this was when it was on a voluntary basis. I used these TEDs and kept a log on the results. When I returned to port I sent the log to NMFS. It wasn't till some time later that I came across my log report in one of NMFS data sheets describing how TEDs would benefit us and would be an asset to the shrimping industry. After careful reading the reports some of my drags were omitted. The drags that showed positive results from TEDs were used and the drags that showed negative results were omitted. This upset me because I was very honest in supplying this information. When I told Andy Kremer that, they, NMFS, put out a false or misleading report, he said no way. I asked him why were the drags that were negative to TEDs omitted. Oh, he said, it's not that they were omitted, the procedure we use is called selective data. He said with a smile, we select certain data out of a report. That is our procedure.

If there is ever going to be a reasonable relationship in the future, the agency must begin to revamp their intentions towards the shrimp industry. Many feel there are individuals in the agency that are continuing to force a wedge between the agency and the industry. This must stop! NMFS must stop misleading the public with selective and extrapolated data. NMFS scientist and biologist must be held accountable for their reports and actions that lead to changes in regulations that affect the livelihoods of human beings. There cannot be any more double standards if the industry is to cooperate with NMFS.

NMFS's approach to protecting and conserving sea turtles is a blanket approach that is inflexible and doesn't follow the recommendations of the National Academy of Science report. The hardships of the TEDs year round and the idea of a blanket regulation to cover all waters at all times and to allow enforcement agents to check a vessel for TED compliance when the trawls are not even in the water were not founded in the Academy of Science study but was put in place for enforcement reasons only; thanks to the admiral of the Coast Guard. This is not fair and needs to be corrected. This is like everyone having their automobiles taken away from them because there are a few people who keep speeding and the only way to stop them is to penalize everyone.

On page 147, the National Academy of Science study makes a very strong case for relaxing TED regulations in areas "where turtles are and have historically have



been rare, such as in the deeper waters of the Gulf." The study also recognizes the fact that TEDs are not necessary everywhere all the time (year around).

Since turtles are normally rare in most of the Gulf of Mexico, there has been very little interaction between shrimping and turtle captures. NMFS' own data shows that it takes many more hours of trawling to catch a turtle in the Gulf than the Atlantic. In addition, their data also shows they almost never venture outside of 5-10 fathoms. NMFS should allow shrimpers to pull their trawls without TEDs during cooler temperature months and outside of 5 fathoms.

The study also found where there was grass and large amounts of debris the use of TEDs would be unreasonable and that tow times should be implicated. The Gulf bottom was a disaster after Hurricane Andrew and we had to keep using TEDs instead of tow times.

The Gulf of Mexico predominantly has a water bottom full of debris because of the discharge of the Mississippi River and other river systems that empty into the Gulf. We also have debris from the offshore oil and gas industry that is unbelievable and still accumulating.

A very serious problem we are facing today has to do with enforcement decisions or judgment calls. Many violations and seizures of catch are due to technical violations that are uncontrollable by the fishermen. One example, many time I have picked up my nets to find a bar on the TED broken on spread apart more than the legal four inches. Many times the cause was from debris but most of the time it was from a school of devilfish or redfish that remodeled the TED. The debris problem also affects the condition and angle of the TED in the trawl. This is beyond our control, but if Coast Guard happens to board you on that drag, your complete catch on board is seized and you are in violation of the Endangered Species Act. Which is lacking common sense here, the E.S. or the enforcement agent?

Another problem is the penalties provisions in the statute and regulations. It is an \$8-12,000 fine for a TEDs violation. What is interesting is these violations can be for no TEDs, TEDs sewn shut, or improper TED. This is like saying a person cited for DWI and a person sited for expired tags will receive the same penalty.

What is interesting is the fact that no turtles have been found in trawl nets when the Coast Guard or NMFS boarded vessels for TED checking. Why should we have to pay this large fine and lose our catch for a violation of the Federal regulation that does not involve the "take" of a turtle. When you are cited for a technical violation to TEDs, what gives the government the power to seize your catch in the hold when there is no proof that they were illegally caught? Is all this the results of an act or law that is too powerful? The fine should be lowered to a reasonable level and seizure of catch should be prohibited except in the case of an individual who is a continuous violator of the regulation. Citations should not be given for a TED violation to fishermen who have their nets hooked up but are not shrimping.

I can tell you after five years of TEDs and five years of losing shrimp, time, and TED cost, the shrimpers have paid their dues for the cause of sea turtles. Everyone wants to protect this species but only at the cost to the shrimpers. If the public feels this strong about this species, it's time to share the cost and replace the lost to the shrimper. Estimates have ranged from as little as 1% by NMFS to as much as 50% by the industry. Most of the industry say there is at least a 10 to 15% loss and the loss increases with the amount of debris in the net that gets caught in front of the TED. Why can't fishermen be compensated for the loss of revenue because of protecting an endangered species? Would this be considered a "regulatory taking"? Give the shrimper an incentive through either a compensation or tax opportunity to write off the loss.

One final point concerns the Endangered Species Act itself. This Act is the most powerful law on the books today. There's no doubt when the Act was written it was for good intentions and never crossed the minds of the authors how misused this Act would become. This Act has become too powerful and too rigid, and at time misused to the height of war. As long as economics has no consideration in the Act, every working person in America goes to work every day without job security. This Act has no respect for human dignity. A judge once told me, if I ever come before him with a TED violation all I will ask you "were you pulling a TED or not". I don't want to hear nothing else. That's the law and I must uphold the law, I don't care if you lose all your shrimp or family or any other circumstance to the case. Under this Act a man has a better chance of clearing himself of a murder charge than a TED violation. How can any American citizen sit by and let a family lose their home to fire as was in California because a fire wall could not be built to protect the home without disturbing the burrows for rats.

Nature is our ward, it is not our master. When man has to choose between his well-being and that of nature, nature will have to accommodate and man must do what he has to do. I will answer questions.

SUBMISSIONS FOR RECORD

Due to the high cost of printing, material submitted from the following was placed in the hearing record files of the Committee:

Belle Chasse, LA

Anderson, Ronald, Louisiana Farm Bureau Federation;
 Bourgeois, J.F., Citizens Action Committee;
 Bourgeois, Russ;
 Bourque, Jr., V.J.;
 Caffey, H. Rouse, Louisiana State University;
 Chaconas, Mr. and Mrs. John J.;
 Cutshall, Jack, and Daniel Lyons, Louisiana Cattlemen's Association;
 Forests & People publication;
 Hero, Jr., Numa C., Hero Wall Company;
 Jurisich, Mitchell;
 Kemmerer, Andre J., NMFS, NOAA, Department of Commerce;
 Lanctot, Randy P., Louisiana Wildlife Federation;
 Louisiana Audubon Council, Dr. Barry Kohl;
 Louisiana Department of Agriculture and Forestry, Bob Odom;
 Melancon, Terry L.;
 National Flood Insurance Program;
 Saucier, Keith R., East Ascension Sportsman's League, Inc.;
 Schmitten, Rolland A., NMFS, NOAA, Department of Commerce;
 Singer, Jodie M.;

Boerne, TX

Adams, Marjorie and L.T. "Red"
 Becker, Daniel
 Beringer, George R., and Lucinda S.
 Bexar County Landowner Coalition
 Bexar County Water Purveyors
 Brazos River Authority
 Bull, Ken
 Carson, Walter
 Chambers, Robert G.
 Chancellor, Glenn A.
 Citizens Against The Endangered Species Act
 Corder, Joella, Awaiting Changes
 Cummins, Eph
 Davidson, Mary A.
 Dillard, Billy L.
 Edwards Underground Water District
 Farm Bureau
 Fasse, Ingeborg, M.D.
 Felps, Jerome K.
 Hansen, Richard
 Harmon, Fuzzy
 Hill Country Foundation
 Holland, Scott

Hoover, Mrs. Billy (Sid)
 Hurst, David L.
 Johnson, J. Willis
 Karnes County Farm Bureau
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 Krueger, Marj
 Lange, Allan J.
 Loe, Barbara A.
 Marshall, Barbara
 McDonald, Keith E.
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 Muecke, Carl, Jr.
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 Pape, David E.
 Pipes, Richard and Joyce
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 Rounsavill, Rebecca
 Schenkkan, P. M.
 Springhills Water Management District
 Stapper, Ann H.
 Stapper, Carlon A.
 Sterling, Judy
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 Texas Organization for Endangered Species
 Texas State Soil and Water Conservation Board
 Texas Wheat Producers Association, Foy Gibson
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